Petition

81-790 NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES SCULLY, SUPERINTENDENT,
GREEN HAVEN CORRECTIONAL FACILITY,
Petitioner,

-against-

EDWARD CAMERA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HON. THOMAS R. SULLIVAN
District Attorney, Richmond County
GEORGE E. MC VAY
Assistant District Attorney
36 Richmond Terrace
Staten Island, N.Y. 10301
(212) 390-5448
Counsel for Petitioner

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. Has the Court below erred in holding that a criminal defendant, aware of the problems of joint representation may not decide to continue to be jointly represented?

2. Has the Court below erred in finding an actual conflict adversely affecting counsel's representation; where counsel was not told of such conflict, relied on the statements of his clients, advised them that if they were lying there would be a conflict, and if they wanted to plead rather than continue the trial they had a right to separate representation?

3. Do conflicts between criminal defendants, unknown to the lawyer who represents them all, involve state action which would provide the basis for a Writ of Habeas Corpus?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Authorities iv

Opinion Below 2

Jurisdiction 2

Statement of the Case:

1. Chronology 3
2. Opinion of Court of Appeals 6
3. Opinion of District Court 8

Reasons for Granting Writ:

1. The Second Circuit Court of Appeals Decision in this Case is in Conflict with the Case of *Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) and Faretta v. California,* 442 U.S. 806, 95 S.Ct. 2525 (1975) 12

2. The Court of Appeals Was Factually Wrong in Finding an Actual Conflict that Adversely Affected Lefkowitz's Representation of Edward Camera 13

3. If there Was a Conflict of Interest in this Case it Involved the Defendants Themselves . . 15

Conclusion:
The Decision of the Second Circuit Court of appeals Should be Summarily Reversed, or in the Alternative, Sufficient Conflict with the Rulings of this Court Having Been Demonstrated a Writ of Certiorari to the Court of Appeals Should Issue 16

INDEX TO APPENDICES

Page

A — Decision and Judgment of Court of Appeals . . 1a

B — Decision and Judgment of Districit Court 23a

C — Authorization for Substitution of Counsel for Petitioner 62a

D — Full Hearing Transcript of Jacob Lefkowitz 63a

E — Partial Hearing Transcript of Justice Vito J. Titone 92a

TABLE OF AUTHORITIES

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) 12,13,15

Faretta v. California, 442 U.S. 806, 95 S.Ct. 2525 (1975) 12

Powell v. Alabama, 287 U.S. 45 (1932) 12

United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979) 12

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To the Honorable, The Chief Justice of
The United States and the Associate Justice
of the United States Supreme Court

The Petitioner, Charles Scully, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit decided and entered on August 26, 1981.*

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* The decision of the Court below was sub nom Edward Camera vs. Walter Fogg, Superintendent of Green Haven Correctional Facility. Charles Scully replaced David Harris in that capacity on

(Footnote continued on following page)

* * * * * * * *

OPINION BELOW: The opinion of the Court of Appeals, not yet reported, appears in the Appendix. The opinion of the District Court, not yet published, also appears in the Appendix. Both opinions name Walter Fogg as Superintendent of Green Haven Correctional Facility. Mr. Fogg has been replaced by Charles Scully. The caption before this Court reflects this change.

JURISDICTION: The judgment of the Court of Appeals for the Second Circuit was made and entered on August 26, 1981. This Petition is being filed within 60 days of the entry (Rules of Supreme Court, Rule 20.1). This Court's Jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit Judges Lumbard and Oakes, and by designation District Judge Lasker—opinion by Lombard, J.) reversed the denial by the Federal District Court for the Southern District of New York (Charles H. Tenney, J.) of Edward Camera's petition for a Writ of Habeas Corpus pursuant to 28 USC 2254.

The Court of Appeals agreed with Edward Camera that he had conflicts with his two co-defendants and those

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(Footnote continued from preceding page)

July 24, 1980. Mr. Harris had replaced Walter Fogg on July 7, 1977.

The Solicitor General, through the Attorney General of the State of New York, allowed for the substitution of the District Attorney of Richmond County as counsel for Petitioner in this proceeding (See Appendix C).

conflicts prevented the lawyer who represented them all from properly representing Edward Camera (2a).

The Court of Appeals and the District Court both deal at length with the "rather bizarre series of events which occurred in late 1970 and early 1971" (2a, 3a) constituting the charges brought against Edward Camera and his co-defendants. Both Courts also recite at length the "considerable judicial consideration, both state and federal, . . . " (24a) given to Edward Camera and his brother Thomas.

Without repeating the detail of fact contained in both opinions, except as necessary to examine the specific findings of the Court of Appeals, a chronology of the history of this case, introducting the names of personages involved, will be set forth followed by the pertinent and operative facts.

CHRONOLOGY

November 30, 1970: Alleged captivity of Thomas Camera by Nicola Rinaldi continuing for two weeks (4a and 32a).

January 1, 1971: Robert and Barbara DiMatteo were kidnapped by brothers Edward and Thomas Camera and their cousin Nicola Rinaldi (5a).

January 15, 1971: Edward and his co-defendants were arraigned on an indictment charging them all with kidnapping in the first and second degrees, assault in the second degree and criminal possession of a weapon (7a).

March 3, 1971: Jacob Lefkowitz retained to represent all three defendants, the third lawyer retained for such representation—Anthony Crecca, first lawyer, Joseph Panzer, second lawyer (7a). (40a)

Numbers in parentheses with suffix (a) refer to appendix attached.

June 2, 1971: Trial began in Richmond County Supreme Court before Honorable Vito J. Titone, Philip G. Minardo, Assistant District Attorney prosecuted, Jacob Lefkowitz defended (8a).

June 7, 1971: Conference in Judge's Chambers—conference with defendants and their families—on record statement by defense attorney concerning conflict—all events involved plea bargain attempts relating to evidence about to be introduced (8a, 9a, and 42a-45a).

June 10, 1971: Jury renders verdict of conviction as to all defendants (9a).

July 21, 1971: Robert DiMatteo, one of the kidnap victims, recants to defense attorney Lefkowitz (47a).

March 16, 1971: Hearing for new trial primarily on victim's recantation. Thomas Camera and Nicola Rinaldi both represented by Lefkowitz. Edward Camera has his own retained lawyer, Daniel Leddy. New trial denied as to all three (9a, 46a-49a).

April 18, 1972: All three defendants sentenced to a mandatory 15 years to life.

May 14, 1973: Appellate Division of New York State Supreme Court unanimously affirms Edward Camera's conviction (Edward Camera being separately represented by Daniel Leddy.)

May 21, 1973: Appellate Division unanimously affirms conviction of Thomas Camera and Nicola Rinaldi, both represented by Jacob Lefkowitz.

September 21, 1973: Leave to appeal to New York State Court of Appeals denied to Edward Camera.

September 30, 1976: Thomas Camera files for a Writ of Habeas Corpus in Federal District Court for the Southern District of New York (Motley, J.) claiming Sixth Amendment violations because of Joint Representation.

October 27, 1976: Motion by Edward Camera to vacate his judgment on basis of conflict of interest in Joint

Representation. Specifically, the conflict was that Edward Camera had a potential defense of abandonment, or more precisely, renunciation, that was not raised because of the joint representation. Motion was denied without a hearing by Honorable Royal S. Radin, Supreme Court, Richmond County.

May 1977: Edward Camera granted reargument and hearing on order of October 27, 1976. Order retracted, in light of Appellate Division action, by Honorable Royal S. Radin.

May 11, 1977: Leave to appeal denial of order of October 27, 1976 denied to Edward Camera by Appellate Division (10a).

July 26, 1977: Edward Camera files for Writ of Habeas Corpus in Federal District Court for the Southern District of New York, (Tenny, J.) raising abandonment, or more precisely, renunciation, as a defense not presented because he was jointly represented (11a).

December 1977: Paul Casteliero, appointed attorney for Thomas Camera, held conferences with Thomas and Edward at Green Haven Correctional Facility. Reviewed full record with both Thomas and Edward, particularly as to conflict issue (10a).

June 27, 1978: Thomas Camera's petition for Habeas Corpus is denied on failure to exhaust state remedies (51a).

February 13, 1979: Edward Camera petitions for Habeas Corpus from Federal District Court, Southern District of New York. Petition denied by Hon. Charles H. Tenney. (11a)

March 1979: Edward Camera, represented by counsel, appealed the denial of his petition for Habeas Corpus of February 13, 1979, but did not perfect the appeal.

April 11, 1979: Thomas Camera withdrew his motion made to vacate his conviction in State Court, pled guilty, and was sentenced to time served (11a).

August 1979: Edward Camera renews application for Habeas Corpus before Honorable Charles Tenney, Southern District of New York (12a).

June 18 & 19, 1980: Hearings held before Honorable Charles H. Tenney on Edward Camera's second petition for Habeas Corpus. Those testifying: Thomas Camera, Edward Camera, Jacob Lefkowitz, Hon. Vito J. Titone, Philip G. Minardo, Paul Casteliero (12a & 13a).

February 24, 1981: Opinion of Tenney, J. denying Edward Camera's petition for Habeas Corpus rendered.

August 26, 1981: Second Circuit Court of Appeals reversed decision of Tenney, J.

COURT OF APPEALS OPINION

The Court of Appeals found that Jacob Lefkowitz represented conflicting interests when he was first retained by Edward Camera, Thomas Camera and Nicola Rinaldi. It was Nicola Rinaldi's father who paid Lefkowitz's fee. Nicola Rinaldi was the ringleader and the Court of Appeals found that Rinaldi was a violent character who kept everyone, including the two Camera brothers, in fear.

Lefkowitz, to protect Nicola Rinaldi, was forced to suppress evidence of Rinaldi's vicious character and thereby failed to raise the defense of duress available from the facts of the confinement of Thomas Camera by Rinaldi during the first several weeks of December 1970.

Lefkowitz, also to protect Rinaldi, attempted to establish the "implausible theory that no kidnapping had occurred" (15a).

The Court of Appeals found it unnecessary to determine if the duress defense could be established, only that it was available to be raised. The Court found that both Camera brothers could have used the duress defense to disassociate from Rinaldi. "It was in their interests to admit some of the damaging facts, and place the blame on Rinaldi" (15a, 16a).

Lefkowitz should have known from the fact that Rinaldi's father paid his fee and that Thomas Camera had been under the control of Rinaldi, albeit for drug treatment purposes, that there was more to the case than the flat denials of guilt he heard from the defendants.

When, during trial the offer of damaging evidence by the prosecution precipitated plea bargaining conferences, the Court of Appeals found that "Lefkowitz was plainly confronted with a conflict" (17a).

The trial judge should also have been aware of conflict on June 7, 1971 when the damaging evidence was being proffered, and there may have been indications of conflict prior to that time. The offer by the trial judge of obtain separate counsel was not sufficient to protect Edward Camera's rights (17a).

Another factor indicating conflict was found by the Court of Appeals when during the plea negotiations on June 7th, 1971 that there was no unanimity among the defendants on whether to accept or reject the plea offer made (18a).

A unified defense advanced by less than equally culpable defendants was seen by the Court of Appeals to suggest the likelihood of conflict.

In specifically dealing with Rinaldi, the Court of Appeals found that he could not avail himself of the argument available to the Cameras because he was not adversely affected by the representation (19a).

The Court of Appeals rejected the argument that any jointly represented defendant, except a criminal lawyer, could knowingly waive his right to separate counsel where it later develops that a conflict existed during the representation. "We conclude there was no waiver of Cameras' rights" (19a, 20a).

In conclusion, the Court held, "In every case there are numerous critical, strategic decisions which must be made by an individual charged with a crime, . . . These decisions can be adequately made only by a defendant who is represented by an attorney who is uncompromisingly dedicated to the interest of the one defendant".

The Court of Appeals provided for issuance of the Habeas Corpus Writ within ninety days.

THE DISTRICT COURT OPINION:

Judge Tenney, based on the trial record, grand jury testimony and the hearing held before him at which Edward Camera, his brother, Thomas, Justice Titone, Jacob Lefkowitz and Philip Minardo, the State trial prosecutor, all testified (25a), concluded that Edward Camera's ". . . conviction was secured by constitutional means and his attorney's performance was not adversely affected by a conflict of interest" (60a).

As to the confinement of Thomas Camera by Rinaldi, the District Court accepted, with great skepticism, Thomas Camera's story of being bound and kept prisoner for ten to fourteen days beginning November 30, 1970, but also found that it was likely that Thomas was in some form of protective custody with Rinaldi occasioned by Thomas's use of heavy drugs.

From Thomas Camera's own testimony, his confinement only lasted for 10 days and, thereafter, he was free to depart by himself, only having to return at night. Thomas said he was still at Rinaldi's house on January 1, 1971 (31a).

Judge Tenney found that:

> "Both petitioner and Thomas admitted they never told Lefkowitz the story of threats, confinement, and

bad treatment allegedly suffered by Thomas. Lefkowitz understood Thomas lived with Rinaldi for some period of time because of Thomas's drug involvement." (32a)

In considering the part that Edward Camera played in the kidnapping of Robert and Barbara DiMatteo on January 1, 1971, the District Court noted that Edward joined the ongoing abduction of the DiMatteos armed with a gun and a briefcase from which he removed hoods and either tape or rope which were placed on the heads of the DiMatteos and used to bind their hands (34a). Edward, thereafter, used his gun to shoot Robert DiMatteo in the chest. There was no evidence that either Rinaldi or Thomas directed the shooting. Edward also freely participated in kicking the bound Barbara DiMatteo to stop her screaming (34a, 35a).

The testimony of both Edward and his brother, Thomas, at the hearing was that they made no attempt to break off from the enterprise because Thomas feared that Rinaldi would subsequently find and kill him, and Edward was afraid that what Thomas feared might really happen (39a, 40a).

All the defendants were represented by Anthony Crecca on arraignment and, thereafter, by Joseph Panzer, who was discharged because he wanted the defendants to plea bargain.

Jacob Lefkowitz was retained and spoke to Panzer concerning the possibility of a conflict of interest and, thereafter, conferred with each defendant individually to be sure no defendant was influenced by the presence of the others. Thereafter, he conferred with them all singly and together. The District Court found this testimony credible notwithstanding the Cameras' contrary statements (40a).

The District Court said:

> "It is clear that Lefkowitz was not informed of the alleged 'duress' by the defendants, or indeed by anybody else. It is also clear just what the defendants did tell him, and what they told him is completely inconsistent with any defense of duress. Because Thomas was one of Rinaldi's suspects in the theft of the money, Lefkowitz made a thorough inquiry into this aspect of the case. He found no disparity, antagonism, or any other indication of conflict.
>
> In reaching this conclusion, Lefkowitz relied on the defendants' representation to him that there had been no kidnapping." (40a)

Lefkowitz's trial strategy was consistent with his opening statement and in particular the cross-examination of Barbara DiMatteo was to show she went with Thomas Camera voluntarily (41a, 42a).

Judge Tenney found that at the start of trial, the defendants all expressed confidence in Lefkowitz (42a), and that when the prosecution offered evidence tending to corroborate the kidnapping and damaging to the defense of no kidnapping, Lefkowitz immediately advised the Court that if his clients were not telling him the truth there very well may be a conflict (43a, 44a). Lefkowitz advised all the defendants and members of the family that if any of the defendants wanted to take a plea, and others did not, they would have to get another attorney (44a) and strike individual bargains (60a).

Judge Tenney found that "both Lefkowitz and Justice Titone advised the defendants and their families of their right to separate counsel and their right to change counsel" (45a, 57a).

The Court further noted that Lefkowitz was the third lawyer in the case and Lefkowitz was representing Thomas Camera successfully in a cigarette smuggling case: "The defendants and their families were cautioned both by

Lefkowitz and by Justice Titone of the possibility of such a conflict" (45a, 46a).

The District Court accepted the testimony of Justice Titone and Lefkowitz as to the warnings to the defendants and their families and found the trial prosecutor Minardo's testimony consistent (46a).

Nine months passed after the defendants continued with Lefkowitz at trial and were found guilty before they were sentenced. Shortly after the conviction, Robert DiMatteo recanted, but after a hearing, recanted his recantation (46a-48a).

The Court noted this recantation event because at the hearing for a new trial based on the recantation, Edward Camera had separately retained counsel while Rinaldi and Thomas Camera continued to be represented by Lefkowitz. The recantation itself was noteworthy for it set forth material in line with the trial defense and did not involve a duress defense because no one had ever advised Lefkowitz of such. The Court stated, "Duress as a defense was born some years later in Green Haven prison" (49a). Even if Edward and Thomas Camera's testimony was believed, the Court found, under New York Law, that no valid defense could be established (51a). The Court doubted the validity of much of the Camera testimony (55a), found that there was no objective manifestations suggesting duress, and determined that the trial court would have properly refused to charge such a defense (58a).

In finding that no conflict of interest actually affected the adequacy of Lefkowitz's representation, the District Court noted that "An attorney is not a psychic; his performance cannot be 'actually affected' by conflicting interests that are unknown to him and remain undisclosed" (56a). Lefkowitz was never apprised of facts which gave rise to conflict.

Lefkowitz did recognize the potential of conflict in any multiple representation and his concern was discussed with the Court and the clients apprised (57a). The Court found that Edward Camera's contention to the contrary was discredited (58a).

Judge Titone was satisfied that the representation complied with the wishes of the defendants.

The conduct of the trial and defense presented, the Court found, resulted from the information supplied Lefkowitz by his clients and not from conflict of interest (59a).

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

THE SECOND CIRCUIT COURT OF APPEAL'S DECISION IN THIS CASE IS IN CONFLICT WITH THE CASE OF CUYLER V. SULLIVAN, 446 U.S. 335, 100 S.Ct. 1708 (1980) AND FARETTA V. CALIFORNIA, 442 U.S. 806, 95 S.Ct. 2525 (1975).

The Court of Appeals has established a rule (19a, 20a) which will make it impossible, in its jurisdiction, in the future, for a criminal defendant other than perhaps a criminal lawyer to avail himself of any but separate or self-representation. All joint or multiple representation is prohibited even where a defendant has been told he risks potential conflict and has the opportunity to secure separate retained or appointed counsel.

A defendant to choose multiple representation in the Second Circuit would have to permit extensive inquiry into his relationship with his co-defendants which might bear little or no relationship to the defense of his criminal case. A criminal defendant although earnestly desiring to jointly present a defense with his co-defendant would be precluded if there was an indication of a prior non harmonious relationship or where one of the parties was in a superior position to the other. The defense case would, in fact, have to be laid bare.

As the Court of Appeals recognizes there are some decisions which are properly left to the defendant such as to plead guilty or to take the stand. One additional, and as important decision, is the right to defend oneself with all the risks intendant on exercising that right. *Faretta v. California,* 422 U.S. 806, 819, 100 S.Ct. 2525, 2533. A direct corollary of that right is to have a right, not unreasonably exercised, to select the lawyer who he wishes to assist in his defense. *Powell v. Alabama,* 287 U.S. 45 (1932); *United States v. Laura,* 607 F2d 52, 56 (3rd Cir. 1979).

The Second Circuit rule on multiple representation would not only normally prohibit such representation and thereby deprive a person of free choice but could as well lead to a disastrous result in the case where, had a common defense been followed, the result would have been victory. That concept is the reason why this Court in *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 1718 (1980), stated that where a defendant has been given the opportunity to object to multiple representataion by the trial court:

> "... a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where '(a) common defense . . . gives strength against a common attack.' " (Citations Omitted)

The holding by the Second Circuit in this case would, in fact, preclude multiple representation.

THE COURT OF APPEALS WAS FACTUALLY WRONG IN FINDING AN ACTUAL CONFLICT THAT ADVERSELY EFFECTED LEFKOWITZ'S REPRESENTATION OF EDWARD CAMERA

In concluding as it did, the Court of appeals has ignored the testimony of both Lefkowitz and Judge Titone, the trial judge. Attached hereto as Appendix D is the full transcript of Lefkowitz's testimony and as Appendix E, portions of Judge Titone's testimony.

Lefkowitz had specialized in Criminal Law since 1947 (68a). He was retained in this case knowing his fee would be paid by Nicola Rinaldi's father (68a). Before accepting representation he spoke to the clients previous lawyer who had suggested the taking of a plea and to all the defendants, (63a), individually and collectively (65a, 70a).

Lefkowitz found no possibility of any conflict (63a).

Even when the case began to go bad he did not see any conflict. When Lefkowitz suggested a plea, his clients would not listen to him (65a). Lefkowitz never emphasized the defense of Rinaldi at the expense of either of the Cameras (68a).

Lefkowitz had had experience with multiple representation and with conflict in such situations. He stated when such occurred, there had to be new counsel (70a).

Lefkowitz had been told the same story by all his clients, individually, from which he concluded a common defense denying the kidnapping event would be a successful defense. A time did come at trial with the introduction of certain evidence which caused Lefkowitz to suggest acceptance of a plea. He told all the defendants that if they were lying to him there could well be a conflict relative to accepting or rejecting a plea solely because they were tied to a common defense.

It is also clear that this situation was made known to the court and the action taken by both the court and Lefkowitz was to advise all three defendants that they had a right to separate counsel either retained or appointed.

It is therefore clear that the present position of Edward Camera was in fact born in Green Haven Correctional Facility in 1977 and 78. There could be no real conflict as it is presently stated unless Lefkowitz knew of the conflict and this he did not. Lefkowitz testified, "I believed what they were telling me [sic] (was) the truth" (88a).

It is impossible for an unknown conflict to affect, adversely or not, the representation of Edward Camera.

Edward Camera knew he had a right to separate counsel but was satisfied with Lefkowitz. To plead or not to pleaad is a defendant's ultimate decision.

IF THERE WAS A CONFLICT OF INTEREST IN THIS CASE IT INVOLVED THE DEFENDANTS THEMSELVES

The uncontraverted fact is that whatever the prior relationship between the parties, which is now phrased in terms of a duress defense, was unknown to both the trial court and defense lawyer.

Cuyler v. Sullivan (supra), is clear that a writ of habeas corpus can be granted only where a defendant is deprived of a fundamental constitutional right by state action.

The alleged failure of either defense attorney or court to recognize a conflict they knew nothing about rules out state action.

CONCLUSION

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE SUMMARILY REVERSED OR IN THE ALTERNATIVE SUFFICIENT CONFLICT WITH THE RULINGS OF THIS COURT HAVING BEEN DEMONSTRATED, A WRIT OF CERTIORARI TO THE COURT OF APPEALS SHOULD ISSUE.

Respectfully submitted,

THOMAS R. SULLIVAN,
District Attorney, Richmond County
Attorney for Petitioner
36 Richmond Terrace
Staten Island, N.Y. 10301
(212) 390-5381

GEORGE E. McVAY
Assistant District Attorney
Of Counsel
(212) 390-5444

APPENDICES

APPENDIX A—DECISION AND JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1512 September Term, 1980
Argued: June 5, 1981 Decided: August 26, 1981
Docket No. 81-2096

EDWARD CAMERA,

Petitioner-Appellant,

-against-

WALTER FOGG, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

Before: LUMBARD and OAKES, *Circuit Judges*, and LASKER,* *District Judge.*

Petitioner Edward Camera appeals from the order of the District Court for the Southern District of New York, Tenney, J., denying his petition for writ of habeas corpus, which challenged his state court conviction on the ground that his counsel's representation of three defendants at trial denied him of his right to effective assistance of counsel.

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* Honorable Morris E. Lasker, of the United States District Court for the Southern District of New York, sitting by designation.

Reversed and remanded with directions to issue the writ if retrial is not commenced within 90 days.

PHYLIS SKLOOT BAMBERGER, The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., for Petitioner-Appellant.

ROBERT A. FORTE, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General, of counsel), for Respondent-Appellee.

LUMBARD, *Circuit Judge:*

Edward Camera appeals from an order of the United States District Court for the Southern District of New York, Tenney, J., denying his petition for a writ of habeas corpus. After being tried in New York State Supreme Court along with his brother, Thomas Camera, and his cousin, Nicola Rinaldi, all three defendants were convicted of kidnapping in the first degree, kidnapping in the second degree, assault, and petty larceny. At trial, all three were represented by the same attorney. Petitioner claims that the multiple representation of the defendants violated his Sixth Amendment right to counsel, applicable by virtue of the Fourteenth Amendment, because the defendants had conflicting interests which prevented counsel from properly representing the petitioner. Because we agree with the petitioner, we reverse and remand with directions to issue the writ unless a new trial is begun with a reasonable time.

I.

As revealed in the transcript of the hearings held by the district court and in the district court's findings, the crimes for which petitioner was charged and convicted grew out of a rather bizarre series of events which occurred in late 1970 and early 1971, and which centered around Nicola Rinaldi. Robert and Barbara DiMatteo, the kidnapping victims, were business and social acquaintances of Rinaldi's who often came to Rinaldi's home in Staten Island to visit him and his wife Joanna. In July of 1970, the DiMatteos invested in a wholesale cigarette business in South Carolina. They were in need of funds, and Rinaldi loaned them $10,000 in the late summer or early fall of 1970; the agreement was that the DiMatteos would pay $200 per week until the $10,000 was repaid in full. During the fall, despite occasional disagreements concerning the loan, the Rinaldis and the DiMatteos saw each other a good deal socially.

About November 20, 1970, Rinaldi came home with a small safe which, with the help of his wife Joanna, he secreted in a closet in his attic. Rinaldi and his wife were having marital problems at this time. On November 25, Rinaldi called Barbara DiMatteo and asked her to come to his house. She found him waving a gun and looking as if under the influence of alcohol or drugs. He told her that he had had a violent argument with his wife Joanna and that she had left him, taking their two children. The next day, Joanna called Barbara to say that Rinaldi had committed himself to Kings County Hospital, apparently after giving the DiMatteos a set of keys to his home. Upon hearing that Rinaldi checked out of the hospital, the DiMatteos drove to his home and returned his housekeys on the 28th, at which time Rinaldi claimed some $12,000 was missing from the house. The DiMatteos returned to Rinaldi's for dinner on the 29th.

On the 30th, Robert DiMatteo left for North Carolina. On the same day, Rinaldi discovered that $65,000 had been removed from the safe in the attic. Rinaldi first contacted the police to whom he was apparently no stranger, and accused the police of the theft. After a conference at Rinaldi's house with Detective Cuff of the 122nd Precinct, some of

Rinaldi's relatives and some neighbors, Rinaldi drove to the DiMatteos' home, forced Barbara into his car, and took out a gun. He accused her of stealing the money, and upon arrival at Rinaldi's home, took her to his basement and help the gun to her head. The gun discharged, but she was not harmed.

Rinaldi next decided that everyone he suspected of the crime should take lie detector tests. On December 1, at the office of a private investigator in Manhattan, Barbara DiMatteo and her father-in-law Philip DiMatteo were tested along with Rinaldi's father, Thomas Camera and his brother Frank Camera. Later that day, Rinaldi brought his wife Joanna to the police for questioning.

At the hearings in the district court, Thomas Camera testified to his version of the events after the meeting at the private investigator's office. According to Thomas, Rinaldi drove him back to Staten Island and then accused him of having stolen the money. When they arrived, Rinaldi forced Thomas into the trunk of Rinaldi's car and drove him to Rinaldi's home. Rinaldi then dragged Thomas into a room which Rinaldi locked from the outside, questioning him about the money. According to Thomas, Rinaldi kept him prisoner in the room for approximately two weeks, tying his hands and feet at night. The district court, although it accepted Thomas' version "with considerable skepticism," believed that the confrontation occurred on November 30, and not the next day.

On December 2, Philip DeMatteo suffered a heart attack. Barbara called her husband Robert to inform him of this, and Robert returned home shortly thereafter. On December 5, Rinaldi, who had been making daily visits to Detective Cuff at the 122nd Precinct, delivered to Cuff a list of suspects. The list included Rinaldi's parents, his sisters, his uncle, his brother-in-law, his cousins Frank and Thomas Camera, the DiMatteos, his neighbor and his wife;

the petitioner was not included. Upon Robert DiMatteo's return to New York, Rinaldi brought the DiMatteos to Detective Cuff for questioning and fingerprinting. A week later, during a social visit to Rinaldi's home, Robert was also given a lie detector test.

Thomas Camera, who was 19 at the time of these events, remained at Rinaldi's home through December. He was not tied up, however, after the initial period, and was allowed out during the day. During this period Thomas was in contact with his family. There was some evidence that Thomas was using drugs at the time. Thomas and Edward testified in the district court that Edward came to visit Thomas at Rinaldi's home. Thomas told Edward, who was 21 at the time, of Rinaldi's actions, and his continued abuse and threats. According to Edward, Rinaldi told him that Thomas's lie detector test had turned out badly and that Rinaldi believed that Thomas had stolen the money. Edward unsuccessfully tried to get Rinaldi to let Thomas go. Edward told Thomas that the family would do what it could, but it was difficult since Rinaldi was "a little crazy" at the time.

The events surrounding the kidnapping itself began with Rinaldi's phoning the DiMatteos on New Year's Day to invite them to drop by his house after dinner for a drink. During December, Robert DiMatteo had spoken to Rinaldi only occasionally, again protesting his innocence. Barbara had avoided Rinaldi, although she remained in contact with Joanna Rinaldi. After dinner, the DiMatteos departed in their car to visit Rinaldi. On the way, they were passed by Rinaldi's car, and when they arrived at Rinaldi's home, Rinaldi and Thomas Camera put guns to their heads and got into the DiMatteos' car. Rinaldi said that someone knew that Robert had stolen the money.

With Rinaldi driving and Thomas sitting in back, pointing a gun at Barbara, the four drove to the Camera home. Rinaldi blew the horn, then got out of the car. Shortly thereafter, Edward Camera, the petitioner, came out of the house with a gun and a small brief case. Hoods were placed on the DiMatteos' heads. The group were driven to a house at an unknown address. On the way Robert was left alone for a moment and removed his hood, enabling him to see his wife being forced into a barrel by the three men. Robert moved toward the barrel, but was shot by Edward. Robert was then tied up by Edward and Thomas. Rinaldi told him he would let the two go if they paid the $65,000; later, he stated that he wanted $100,000. Robert told Rinaldi he had no money. He asked that his hands be untied as he was having difficulty breathing. Edward Camera cut Robert's clothes down the back to permit him to breathe. Rinaldi during this time was threatening Barbara and demanding money from her or her father-in-law Philip DiMatteo. She was forced to call her father-in-law and request him to pay $58,000 in specified denominations.

After Barbara pleaded with Rinaldi and the Cameras to release her husband and take him to a hospital, they agreed to do so, but to keep her under their control. Thomas and Edward took Robert to a hospital in Brooklyn, and left him there, returning to meet Rinaldi and Barbara. At the hospital, Robert DiMatteo was questioned by police detectives. He asked to speak with Detective Cuff, but Cuff was out sick and was not contacted until the early afternoon of January 2.

When the Cameras returned from leaving Robert at the hospital, the three men took Barbara, with a paper bag over her head, to the Manhattan Beach Hotel, in the early morning hours of January 2. After Rinaldi registered for a room, Thomas escorted Barbara into the hotel. Apparently, Edward and Rinaldi then left the scene. Thomas remained with Barbara in the hotel room, where she was tied up with adhesive tape and placed on a bed. At some point, Thomas allowed her to go to the lavatory and slit the tapes securing her. While in the bathroom, she tore the tapes off and hid them.

Late in the afternoon of the 2nd, Thomas received a call, and then released Barbara. The call was probably from Rinaldi telling Thomas to release Barbara. Rinaldi had appeared in the 122nd Precinct House after Cuff, finally contacted by Robert DiMatteo who related the events of the past two days, told Rinaldi's uncle that Rinaldi should come immediately to the precinct house. Cuff demanded that Rinaldi produce Barbara at the precinct house within an hour. Rinaldi went to a bar where he made a phone call, presumably to Thomas Camera.

Rinaldi and Edward and Thomas Camera were charged with three counts of kidnapping in the first degree: first, with abduction of Barbara DiMatteo with intent to compel ransom, second, with abduction of Robert DiMatteo with intent to compel ransom, and third, with abduction and detention of Barbara DiMatteo for twelve hours with intent to terrorize. The three were also charged with assault in the first and second degree for injuries to Robert DiMatteo and with the theft of personal property of the DiMatteos including their automobile. Finally, Edward was charged with possession of a loaded weapon.

At arraignment on the indictment, on January 15, 1971, the three defendants were represented by Joseph Panzer. Panzer represented the three until sometime after May 3 when Jacob Lefkowitz was retained to replace Panzer. Apparently, Panzer was dismissed because he wished the defendants to take a plea. Lefkowitz was hired and paid for by Rinaldi's father. He had worked for a company with which Rinaldi's father was associated. He was also representing Thomas Camera in another matter relating to illegal smuggling of untaxed cigarettes.

According to Lefkowitz, he conferred with the defendants together and individually in order to determine whether there was any conflict of interest between the defendants. The district court did not accept the Cameras' testimony that they never met with Lefkowitz alone. In any event, Lefkowitz, believing the stories told by the defendants, decided that the best strategy to take at trial would be to deny that the kidnapping ever occurred.

Trial commenced on June 2, 1971 before Supreme Court Justice Vito Titone. In his opening statement to the jury, Lefkowitz said that the evidence would show that no kidnapping occurred, that the DiMatteos had simply been visiting Rinaldi on the date in question, and that the kidnapping was a figment of DiMatteo's imagination. He said Robert had been shot in an accident and had asked Thomas and Edward to take him to a Brooklyn hospital so the police would not know of the injury. Finally, Lefkowitz told the jury that Barbara and Thomas Camera had been having an affair and went to the Manhattan Beach Hotel together to spend the night.

Robert DiMatteo testified first and gave his version of the events of January 1st and 2nd, which supported the charges against the defendants. Barbara testified next. After she testified to the same events, a recess was called during which there was a conference in the Judge's chambers. At the recess, the prosecution turned over Barbara's grand jury testimony. Included in that testimony was a comment that Barbara knew that Thomas had been "taken prisoner" by Rinaldi.

Also at the conference, the prosecution stated that after the recess, it would seek to introduce into evidence a sweater which Barbara wore on January 2, and the tape which had been removed from her wrists at the hotel and which had subsequently been recovered. Attached to the tape were yarn remnants which matched the material of her sweater. The physical evidence was devastating to the defense Lefkowitz had sought to put forward. He asked for permission to hold a conference with the defendants and their families. He stated that a conference was necessary because there was "a possibility of conflict of interest" and that "although they say to me one thing, I want them to say it in front of the parents and the wives . . . because . . . there could very well be a conflict if they are not telling me the truth." Justice Titone indicated that he was willing to accept a plea to a lesser offense, but only if all defendants agreed to plead.

At the meeting with the defendants and their families, Lefkowitz discussed the plea possibilities. He told defendants of the lesser crimes to which they could plead and their penalties. Although Edward Camera indicated that he wanted to plead, Rinaldi remained firm in his refusal. When Rinaldi's mother asked Lefkowitz whether a plea by one would hurt the others, and Lefkowitz replied in the affirmative, Edward said he would go along with the trial. Lefkowitz made one last attempt to convince the defendants to take the plea after the defendants had been returned to the holding pen. According to Edward Camera, Rinaldi screamed at him that he wanted to go to trial and that had he wanted to plead he could have done so when Panzer was his attorney.

The trial continued with the damning evidence introduced. In defense, Lefkowitz called four witnesses: a desk clerk and porter from the Manhattan Beach Hotel, a friend of the Rinaldi's who implied that Barbara in fact stole Rinaldi's money, and Joanna Rinaldi who testified as to the deteriorating state of the DiMatteos' marriage. The jury found all three defendants guilty of kidnapping in the first degree for abduction and detention of Barbara DiMatteo for twelve hours with intent to terrorize, of two counts of second degree kidnapping, of second degree assault, and of petit larceny. Mandatory fifteen year penalties for first degree kidnapping were imposed on all three defendants with the sentences on the other crimes to run concurrently. A motion for a new trial was denied by Justice Titone.[1]

In 1976, petitioner moved in state court to vacate his conviction on the ground that he had been denied effective assistance of counsel due to the multiple representation. Edward alleged further that due to a conflict of interest, his attorney had failed to put forth a defense: that Edward could not have been found guilty of abducting and detaining Barbara with intent to terrorize her, since he had left the hotel immediately after dropping her off and knew nothing as to subsequent events. The motion to vacate was denied. Although reargument was later granted due to developments in Thomas Camera's federal habeas suit discussed below, the granting of reargument was retracted upon the Appellate Division's affirmance of the judgment of conviction. Edward Camera then filed his first petition for habeas corpus relief in district court.

Thomas Camera, in the meantime, had filed his own federal habeas petition. He too alleged a denial of effective assistance of counsel because of the multiple representation. In the course of proceedings on this matter, the State agreed that there was nothing on the record which demonstrated that Justice Titone had informed the defendants of their right to separate counsel or their right to assigned counsel. It was this admission which influenced the state court originally to grant rehearing of Edward Camera's motion to vacate his conviction. In any event, the district court ruled that Thomas's petition would be dismissed unless he could allege specific instances of prejudice from the multiple representation.

Thomas Camera then secured the services of a Legal Aid attorney. In December 1977, the attorney visited both Cameras at Green Haven State Prison. In the course of this visit, the attorney elicited information which supported a defense that both Cameras acted under duress from Rinaldi, a defense which was never raised at trial. The attorney concluded that the duress defense could have been proven by the evidence of Rinaldi's captivity of Thomas, his threats to both brothers, and Edward's statements that he had been induced to participate through fear of Rinaldi's possible behavior toward his brother.

When the allegations of the failure to raise the duress defense were presented on Thomas's behalf, the district court, noting that the claim had never been made in state court, dismissed the failure to exhaust state remedies. Thomas then brought a motion to vacate his conviction in state court pursuant to §440.10 of the New York Criminal Procedure Law.

In the meantime, Edward Camera's writ of habeas corpus was denied by Judge Tenney on February 13, 1979. Edward had asserted that a potential defense—that of abandonment or lack of requisite intent as to the detention of Barbara in the hotel was not raised by Lefkowitz due to the conflicting interests of all three defendants. The court held that such a defense was patently frivolous; it noted that Edward had been present at the start of the abduction to the hotel and participated fully in the kidnapping from the beginning. Therefore, no prejudice from multiple representation was demonstrated.

On April 11, 1979, a hearing was held in State Supreme Court on Thomas Camera's §440.10 motion. When the case was called, the court was informed that the State was consenting to the vacating of Thomas's conviction, and that Thomas would plead guilty to a lesser offense for which the time already served would suffice as his sentence. In staating the reasons for agreeing to vacate his conviction, the Assistant District Attorney stated that there was "no direct indnication" in the record that defendants were warned "of the risks of representation at the time of trial by one lawyer of three defendants," although such warnings may have been given off the record. He also stated that in light of the fact that the attorney's fees were paid by one defendant's father, and the fact that there was an incipient conflicting defense—that of duress—available to Thomas, a new trial would probably be necessary. He concluded that the State did not wish to undergo such a trial and noted Thomas's young age at the time of the crimes and the more substantial participation of Rinaldi, as well as that of Edward who shot one of the kidnap victims.

In light of these developments, Edward Camera, now represented by separate counsel, in August of 1979 brought a second petition for habeas corpus in the district court. He again asserted that the multiple representation had denied him effective assistance of counsel. He alleged that Lefkowitz had conferred alone with Rinaldi on many occasions, had devised a strategy most beneficial to Rinaldi, and had suppressed the defense that both the Cameras were acting under duress. The district court held two days of hearings on the petition, at which the Cameras, Lefkowitz, and Judge Titone testified. The Cameras both testified to Thomas's detention by Rinaldi. Thomas testified that even after being held captive, he acted in fear of Rinaldi. Edward Camera testified that Thomas had told him of his confinement and his fear. He also testified that when Rinaldi came to his house on the day of the kidnapping, Edward resisted the plan, but went along only after Rinaldi stated that Thomas would be "hurt" if he did not do so.

The Cameras also testified that they returned to Rinaldi after taking Robert DiMatteo to the hospital only out of fear that Rinaldi would eventually find them. The Cameras testified that at their trial they had not been told of their rights to assigned counsel, although Edward admitted that he had once been charged in a criminal matter and had applied for assigned counsel, but had been turned down due to his income. As for the plea, both testified that Rinaldi was adamant about going to trial. Thomas testified that he was unsure at the time whether or not to plead, but that Edward wanted to do so.

Lefkowitz testified that he had spoken to each defendant alone and determined that no conflict existed, and so informed Justice Titone. He testified that he told the defendants of the possibility of obtaining separate counsel. He did not discuss possible conflicts, at least in those terms, because he doubted whether they understood what a "conflict" was. Justice Titone testified that, because of the need to use his chambers during the trial for conferences, these conferences were off the record. He testified, however, that he had in fact advised the Cameras as to their rights to separate retained or assigned counsel. He stated that he was assured by Lefkowitz that there were no conflicts of interest between the various defendants. He also said that his policy at the trial had been that he would accept a plea only if all three defendants pleaded.

The district court denied the second petition for habeas relief. It ruled that under the governing standard of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), Edward had to prove an actual conflict of interest which adversely affected his lawyer's representation. The court ruled that no such showing had been made since Lefkowitz had never been aware of the possibility of a separate duress defense. No one had ever informed him of information suggesting such a defense. The only evidence at trial was a brief mention in Robert DeMatteo's trial testimony and in Barbara's grand jury testimony, yet Lefkowitz could be excused from paying any attention to these, particularly since he was under the impression that Rinaldi was caring for Thomas because of Thomas's drug problems.

The court also found that petitioner was repeatedly told by Lefkowitz and Judge Titone that he could secure separate counsel, even though neither had information leading them to believe there was any conflict. Finally, the district court held that under its reading of New York law, no duress defense was possible even if the facts were as testified to by the Cameras. As to the other alleged inadequacies of the representation, the district court held that the attorney was also unaware of any information leading him to believe Edward had a defense to the first degree kidnapping charge because he left Thomas and Barbara DiMatteo at the hotel and did not participate any further in the crime. As to the difference in the defendants' views regarding guilty pleas, the district court found that Lefkowitz had been told that the judge would accept guilty pleas only if all three defendants agreed to plead, and that Edward decided not to plead upon learning of possible adverse effects on the others.

II.

As the district court noted, the Supreme Court in *Cuyler v. Sullivan, supra,* held that multiple representation of a defendant in state criminal proceedings constitutes a violation of a defendant's Sixth Amendment right to counsel where "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. Once a party demonstrates such an "actual conflict," no further showing of prejudice is required. *Id.* at 349-50. We believe that there was such a conflict here and that it adversely affected Camera's representation.

Although the Supreme Court has not defined what an "actual conflict" entails, there are some indications given in the *Cuyler* opinion. First, the Court referred to the fact that a violation of Sixth Amendment rights occurs if "counsel actively represented conflicting interests." *Id.* at 350. Moreover, the Court elucidated the standard by comparing two of its earlier opinions. In *Glasser v. United States,* 315 U.S. 60 (1942), the Court held that multiple representation violated a defendant's constitutional rights when the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked the defendant with the crime and failed to object to arguable inadmissible evidence. The Court in *Glasser* found that these omissions resulted from a desire to protect a co-defendant. On the other hand, in *Dukes v. Warden*, 406 U.S. 250 (1972), the Court found no constitutional violation where Dukes pleaded guilty on the advice of two lawyers and later discovered that one of them, representing Dukes's codefendants on an unrelated charge, sought leniency in sentencing by arguing that the codefendants' cooperation with police lead Dukes to plead guilty. As stated in *Cuyler*, the Court in *Dukes* failed to find anything in the record which indicated an "actual lapse in representation." 446 U.S. at 349.

Applying these principles here, we believe that Lefkowitz's representation of these three defendants involved, from the start, representation of conflicting interests, and that the conflict became apparent for all to see at the time the prosecution offered to introduce the severely damaging physical evidence and in the resulting discussion regarding possible guilty ples with the defendants. To begin with, Rinaldi's interests differed from those of the Cameras. There is no question that Rinaldi's degree of culpability was much greater than that of the others. Rinaldi was a violent, unpredictable character who kept the Cameras, and everyone else who knew him, in constant fear. The potential duress defense of the Cameras was supported by evidence of this violent nature and evidence of Rinaldi's rather bizarre behavior in the weeks preceding the kidnapping. To protect Rinaldi, however, counsel was forced to minimize the effect of this evidence, to prevent its admission, and to attempt to establish a rather implausible theory that no kidnapping had occurred.

We believe it unnecessary to determine whether or not a defense of duress could have been established, for such an inquiry goes to the question of prejudice, an issue which the Supreme Court has held we need not reach. It is sufficient to point out that the defense could have beenr aised, and that there was a basis for it, and that it would have served to dissociate the Cameras from Rinaldi whose interests clearly diverged from the Cameras'. It was in their interest to admit some of the damaging facts, and place the blame on Rinaldi. Our finding of an actual conflict of interest adversely affecting representation is supported by the fact that the lawyer was chosen and paid for by Rinaldi's father. Moreover, given Rinaldi's personality, there is reason to believe that the Cameras' fear of Rinaldi continued after the kidnapping up to and including the time of trial.

The district court held that no actual conflict existed because counsel was not aware of facts which would lead him to believe there was any such conflict. We disagree. Lefkowitz should have realized that there was more to the case than the flat denials he apparently received from the defendants. He knew that Rinaldi's father was paying his fee. It was clear that Rinaldi was the most active codefendant and was the likely leader of whatever had occurred. Counsel knew of Thomas Camera's being under the influence of Rinaldi. Even if, as the district court believed, counsel had no direct evidence of Thomas's confinement, counsel believed that Thomas was in Rinaldi's care so that Rinaldi could assist him in getting rid of certain drug problems. Lefkowitz, however, chose to ignore these factors and adhere to the implausible story upon which Rinaldi insisted.

The conflicting interests between Rinaldi and the Cameras, as well as the continued domination of the Cameras by Rinaldi, became clear at the time of the prosecution's offer of physical evidence and the resulting plea discussion. The prosecution's offer of evidence revealed to Lefkowitz that the stories he had been told were obviously false. There was now a strong possibility of conflicting interests, and Lefkowitz so told the judge. During the ensuing discussions with defendants and their families, Edward Camera stated that he wished to take a plea. He was overruled in effect, by Rinaldi who refused to consider a plea. After having told the judge that a conflict probably existed, and then being told by one defendant that he wished to take a plea and by another that he would not, thus forcing the first not to take a plea, Lefkowitz was plainly confronted with a conflict.

Moreover, at the time of these discussions, the existence of a conflict should have been amply obvious to the trial judge himself. In *Cuyler, supra*, the Supreme Court held that trial judges must make an inquiry into the propriety of multiple representation where the judge knows or reasonably should know that a conflict exists. 446 U.S. at 347. As in Lefkowitz's case, there may have been sufficient evidence *before* the prosecution's offer of proof to put the judge on notice of the diverging interests. Nevertheless, there can be no doubt that such facts existed at the time and immediately after this offer. The judge testified in the district court that he was aware that the defendants were unsure about the advisability of taking pleas and that there was no unanimity among the defendants on this issue. It was clear from trial testimony that Rinaldi was the ringleader. The now discredited story offered by the defense, the defense counsel's mention of the resulting possibility of a conflict of interest, and the difference of opinion as to pleading noted by the judge should have lead him to inquire carefully into the conflicts. The judge's suggestions that separate counsel could be obtained were not sufficient to protect the rights of Edward Camera.

The district court held that the plea discussions evidenced no conflicts of interest because the judge had stated that he would only accept a plea from all three of the defendants. We fail to see how this highly improper ruling somehow operated to remove any conflict of interests. If anything, it was a recognition that certain defendants were more disposed toward pleading than others. The judge's requirement of unanimity merely exacerbated Lefkowitz's difficulties in adequately representing all three defendants and demonstrated the impossibility of his doing so. Separate counsel would have been better able to obtain separate consideration.

We believe that the totality of circumstances amply demonstrates the actual conflicts of interest which existed throughout. Lefkowitz was retained and paid for by one defendant. That party was clearly more culpable and was the leader of the group. There was a strong likelihood that the other co-defendants remained in fear of him. The defense presented was a flimsy one, which was completely undermined by the prosecution's offer of physical evidence demonstrating that a kidnapping had occurred. In discussing plea possibilities, it was clear that the defendants had different views of their interests, and that the leader of the group resisted any attempt by his co-defendants to undermine his position. There was a duress defense which could have been raised had there been separate counsel and which could not have been raised with one counsel representing all three. Given all these factors there was clearly an actual conflict of interest which adversely affected the representation of the Cameras and Rinaldi by the same counsel.

The facts of this care are quite similar to others in which conflicts were found where co-defendants were forced to take unified defenses despite the fact of varying degrees of culpability. In *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973), an actual conflict was found where a woman accused with her husband of killing her child was represented by the same attorney as her husband, and the evidence revealed that the husband alone had perpetrated the acts resutling in the child's death. Similarly, in *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975) and

United States ex rel. Bermudez v. Vincent, 472 F. Supp. 448 (S.D.N.Y. 1979),[7] multiple representation was found constitutionally infirm where unified defenses were taken, yet the evidence suggested that the crime was committed by only one person. Finally, in *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3rd Cir. 1973), a conflict was found where an employee had been represented by an attorney paid for by his co-defendants who were his employers. Although some of these cases were decided upon standards more constitutionally demanding than that imposed in *Cuyler, supra,* they suggest the likelihood of a conflict of interest when a defendant is required to go along with a unified defense despite facts which suggest differences in relative culpability.

The conflicts of interest found here did not "adversely affect[]" Rinaldi's representation within the meaning of *Cuyler, supra.* Indeed, Lefkowitz's entire efforts appear to have been devoted to protection of Rinaldi's interests at the expense of the Cameras. The strategy pursued at trial was the one Rinaldi wanted and the only one possible for him. The failure of the others to plead or to testify about what had happened were of benefit to Rinaldi. It was protection of Rinaldi that caused the Cameras to forego their own defenses which might have lead the jury to disassociate them from Rinaldi and find them guilty of lesser crimes.

The State argues that, despite these conflicts, the defendants were aware of the problems of joint representation but adhered to their choice of counsel, thereby waiving any objections concerning their representation. We disagree. To begin with, criminal defendants are almost never qualified to decide such questions for themselves. Moreover, whether or not Lefkowitz ever spoke with the defendants separately, he never explained the problems of multiple representation in any way which would make clear to the Cameras how their different interests might be affected by multiple representation. Lefkowitz testified that he never used the term "conflicts" because he thought defendants would not understand the term. He may well have said that they could arrange for separate counsel. yet such advice would be meaningless where defendants would not be able to see the need for such counsel and where they may have been in some fear of Rinaldi's reaction.

Under circumstances such as here existed it is immaterial whether or not the defendants were advised of their rights to separate counsel. No defendant, save perhaps one who is a lawyer familiar with criminal cases, can be expected to understand the dangers and disadvantages of multiple representation. If defendants consented to or acquiesced in multiple representation, were held to waive their rights to object to such representation where it later develops that there has been a conflict of interests, such as here existed, their Sixth Amendment rights of counsel would be of little value. We conclude there was no waiver of Cameras rights.

This case well illustrates the extreme hazards of multiple representation in the defense of criminal cases.[3] *See United States v. Carrigan,* 543 F.2d 1053, 1057 (2d Cir. 1976) (Lumbard, J., concurring); *United States v. Mari,* 526 F.2d 117, 119 (2d Cir. 1975) (Oakes, J., concurring); *Morgan v. United States,* 396 F.2d 110 (2d Cir. 1968). *See generally,* Gaer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the defense Attorney,* 62 Minn. L. Rev. 119 (1978); Note, *Developments in the Law—Conflicts of Interest in the Legal Profession,* 94 Harv. L. Rev. 1244, 1384-1395 (1981). In every case there are numerous critical, strategic decisions which must be made by an individual charged with a crime, such as whether to become a witness for the State and against his partners in crime, whether to plead guilty to lesser offenses, and whether to take the stand in his own behalf. These decisions can be adequately made only by a defendant who is represented by an attorney who is uncompromisingly dedicated to the interests of that one defendant. Moreover, in many situations, such as the one here, there will be different degrees of culpability, and as a result, different defenses and considerations which may be raised on behalf of each defendant. Often related to that problem, there is a great likelihood in any multiple representation situation that one defendant may attempt to override the will of the others. This is particularly so where one defendant assumes the burden of paying counsel fees for all.

As the record demonstrates, there was a clear conflict of interest which deprived petitioner of effective representation. We therefore reverse and remand with directions to issue the writ unless a new trial is commenced within ninety days.

FOOTNOTES

1. The motion was made some months after trial when Robert DiMatteo, now estranged from his wife, wrote out a statement declaring that there had been no kidnapping. He was evidently attempting to have the defendants released in order to terrorize Barbara. There was also some question as to the bias of one of the jurors. At the hearing on the motion, Edward was now represented by his own counsel.

2. *Vincent* was reaffirmed by us after being remanded by the Supreme Court in light of *Cuyler.* See 614 F.2d 1285 (2d Cir. 1979), vacated in light of *Cuyler v. Sullivan sub nom. Harris v. Bermudez,* 446 U.S. 962 (1980), affirmed without opinion, No. 79-2221 (2d Cir. March 11, 1981), *cert. denied,* 49 U.S.L.W. 3912 (June 8, 1981).

3. This principle was recently recognized by an amendment to the Federal Rules of Criminal Procedure, effective December 1, 1980. Rule 44(c) states:

JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

APPENDIX "B"
DECISION AND JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD CAMERA,

Petitioner,

-against-

WALTER FOGG, Superintendent,
Green Haven Correctional Facility,

Respondent.

APPEARANCES

For Petitioner:
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
531 United States Court House
Foley Square
New York, New York 10007
Of Counsel: PHYLIS SKLOOT BAMBERGER, ESQ.
JAMES COHEN, ESQ.

For Respondent:
ROBERT ABRAMS
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
Of Counsel: ROBERT A. FORTE, ESQ.
GEORGE McVAY, ESQ.

TENNEY, J.

Edward Camera, convicted in 1972 on charges of kidnapping in the first degree, kidnapping in the second degree, assault in the second degree and petit larceny, has again petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The petitioner is presently serving a state prison sentence of fifteen years to life imposed on the first degree kidnapping conviction. In this petition, Camera alleges that he was denied his constitutional right to effective assistance of counsel because his attorney, who also represented Camera's two codefendants, suffered from a conflict of interest that prevented him from raising a duress defense on the petitioner's behalf. For the reasons discussed below, the petition is denied.

This case, together with a companion case involving petitioner's brother Thomas, has invoked considerable judicial consideration, both state and federal, because these defendants believed they could "beat the rap" and repeatedly refused to plead guilty to a lesser included claim—a plea that had been recommended to them by at least two of their lawyers and by the sympathetic trial judge who presided at their trial. Furthermore, they deceived their attorney which led him to base their defense on allegations that proved unsupportable, and were convicted of a crime that mandated a fifteen-year minimum prison sentence.

This Court had occasion in its prior Opinion of February 13, 1979 to review in summary fashion the facts developed at petitioner's trial in the state court. Yet the present claim, that defense counsel failed to raise on petitioner's behalf the defense of duress, requires considerable amplification of additional facts. Therefore, we look not to the trial record alone, but also to testimony before the grand jury which indicted petitioner, and to the evidence presented to this Court subsequent to its decision of February 13, 1979 in connection with the revised petition. At the hearing before this Court, testimony was provided by the petitioner; his brother, who was a codefendant in the kidnapping case; Justice Vito J. Titone, who presided over the state court trial; Jacob P. Lefkowitz, petitioner's defense attorney; and Philip Minardo, the state prosecutor.

Petitioner, together with his brother, Thomas Camera, and their cousin, Nicola Rinaldi, was indicted in 1971 in Richmond County, New York for the kidnapping of Barbara DiMatteo and her husband, Robert DiMatteo, and for other related crimes. The trial, conducted before Hon. Vito J. Titone, Justice of the supreme Court, Richmond County, commenced on June 2, 1971 and concluded on June 10, 1971 with the jury verdict referred to above. Although all three defendants were initially represented by other counsel, they were represented by Jacob P. Lefkowitz, an experienced criminal trial attorney, for most of the pretrial period and throughout the trial. Lefkowitz was retained by Rinaldi's father to represent his son and his two nephews. Lefkowitz knew Rinaldi senior through a company that employed Rinaldi and for which Lefkowitz was the attorney. At that time Lefkowitz was also representing Thomas Camera with respect to charges of smuggling untaxed cigarettes from the South.

The criminal charges for which petitioner was convicted did not involve strangers but rather relatives or business and social acquaintances. Robert DiMatteo had worked as a baker for some years in the family business of his father, Philip DiMatteo. However, in July of 1970

Robert and Barbara DiMatteo invested in a wholesale cigarette business in South Carolina, and Robert gave up his job in the family bakery. Shortly thereafter the cigarette business began to decline. In the late summer or early fall of 1970, Rinaldi, who had first met Robert DiMatteo in December 1969, loaned Robert and Barbara $10,000, pursuant to an agreement that Rinaldi would be paid $200 per week until the loan could be repaid in a lump sum. Although there were subsequent disagreements about the loan payments, the two families became close social friends, despite the cigarette business problems. Robert brought Barbara over to Rinaldi's house in September 1970 where she met Rinaldi's wife, Joanna. From that time on Barbara and Joanna became close friends and the Rinaldis and DiMatteos dined at one another's home or went out together frequently. However, in both families the relationship between husband and wife appears to have been deteriorating.

On or about Friday, November 20, 1970, Rinaldi came home with a small safe which his wife, Joanna, assisted him in secreting in the upper part of a clothes closet situated in the attic. At some time between November 21 and November 30, probably after November 26, somebody broke open the safe in Rinaldi's attic closet and allegedly stole $65,000 in cash. The events preceding and following the alleged theft are described below in order to provide a complete picture of the relationships and interactions between the various players in the drama that ensued.

On Thanksgiving eve, November 25, Rinaldi telephoned Barbara at the home of her parents-in-law, Mr. and Mrs. Philip DiMatteo, and asked her to come over to his house immediately. When she arrived she found the house in shambles and Rinaldi, dazed on drugs or alcohol, sitting in a chair waving a gun. She learned that Rinaldi had had a violent argument with his wife and that Joanna had taken their two children and left the house. Before Barbara

DiMatteo left Rinaldi begged her to help find Joanna. On Thanksgiving day, November 26, Joanna, who was staying with her mother, called Barbara to advise her that Rinaldi had committed himself to Kings County Hospital. However, since Rinaldi had driven over to the DiMatteos in the late afternoon of Thanksgiving day and given them his house keys, he could not have entered the hospital until late on November 26. Barbara heard from Joanna again on the following day, November 27, that Rinaldi had left the hospital. On Saturday, November 28, Barbara and Robert DiMatteo went over to Rinaldi's house to return his keys, at which time Rinaldi claimed that $12,000 was missing from the house. The DiMatteos returned to Rinaldi's home the following day, Sunday, November 29, for dinner. They discussed Joanna's disappearance and Rinaldi stated that he had given her the car keys and keys to the safe deposit box.

On or about Monday, November 30, Robert DiMatteo left for North Carolina after dining at home with Barbara, Barbara's father, and Rinaldi. Sometime that day, Rinaldi discovered that the safe in the attic of his house had been broken into. At approximately 3:30 p.m. Detective Cuff of the 122nd Precinct, Staten Island, went to the Rinaldi home at 198 Arcadia Avenue in response to a phone call from Rinaldi. Rinaldi informed Cuff that somebody had broken into his house, broken open a small safe and removed $65,000 in cash. Present at this conference were Rinaldi's mother, his uncle Frank Gennaro, and two or three unidentified neighbors. Rinaldi, who was no stranger to Cuff, stated he believed the police had taken the money. After the conference at Rinaldi's home, Rinaldi went to the 122nd Precinct around 5:00 p.m. and was there for over an hour. He then drove to the DiMatteos' house, forced Barbara into the car, accused her of stealing the money, attempted to search her, and placing a gun to her head, drove her to his house where she saw Rinaldi's parents and her father-in-law, Philip DiMatteo. Rinaldi took Barbara to the basement of his house and again placed a gun at her head. At some point the gun was discharged but she was not wounded.

Rinaldi then demanded that everybody take a lie detector test. On the following day, Tuesday, December 1, Philip DiMatteo and Barbara went with Rinaldi to the office of Victor Kaufman, a private investigator, at 17 Battery Place, New York City, and were both given lie detector tests. Also present at Kaufman's office were Rinaldi's father, Thomas Camera and his brother Frank, all of whom were tested. On the same day Rinaldi brought Joanna, who had since returned, to the 122nd Precinct for questioning.

On the following day, December 2, Philip DiMatteo, who had threatened action against Rinaldi for his treatment of Barbara, suffered a massive heart attack. Barbara called Robert in North Carolina to inform him of this and the events of the past few days. Robert returned home that day or the next. In the meantime Rinaldi had been making daily visits to Detective Cuff, and on December 5 he furnished him with a list of suspects. The names included were: Rinaldi's parents, Joseph and Frances Rinaldi; his sisters, Carol and Francina; his uncle, Frank Gennaro; his brothers-in-law, Joseph Benvenuto and Joseph Musachio, his cousins, Frank and Thomas Camera (petitioner was apparently not included); Barbara and Robert DiMatteo (the latter identified as being in North Carolina); his next-door neighbor Dom Basile; and his wife Joanna who was linked with three individuals identified as safe-crackers in Brooklyn. Rinaldi told Cuff about the lie detector tests, and asked Cuff about the validity of such tests. He also told Cuff that Barbara DiMatteo had "beaten the test." Rinaldi then told Robert DiMatteo that he and his wife Barbara were suspected and that Robert would have to go to the 122nd Precinct. Cuff recalled Rinaldi escorting

Robert to the station house on Sunday, December 6. Cuff questioned Robert and took his fingerprints. On the following day, Robert and Rinaldi came in with Barbara, and Cuff questioned and fingerprinted her. About one week later, Rinaldi asked the DiMatteos over for a social visit, at which time Robert had to go down to the basement and take a lie detector test. Dominic Basile, Rinaldi's neighbor, was also given a lie detector test at this time. So far as the record indicates, he was the last person mentioned herein who was given a lie detector test.

With respesct to the lie detector tests, the most important date of present concern is December 1, 1969 when Robert's father, Philip DiMatteo, and Barbara, together with Frank and Thomas Camera were tested by Kaufman in New York City. Also present at that time was Rinaldi's father. In the hearing before this Court, Thomas testified that after the test Rinaldi drove him back to Staten Island, accused Thomas en route of having stolen the $65,000 and, when they reached Staten Island, locked Thomas in the trunk of the car and then drove to the Rinaldi house. When they arrived, Rinaldi drove into the garage and dragged Thomas into a finished room that locked from the outside, locked him inside, anad started questioning him about the missing money. Thereafter, according to Thomas, Rinaldi kept him prisoner in the room for 10-14 days with his hands, legs and feet tied up during the night. It should be noted that on the evening of November 30, the prior day, Rinaldi had accused Barbara of the theft, taken her to his house, and held a gun to her head. The Court will thus accept, with considerable skepticism, that a physical confrontation occurred between Rinaldi and Thomas resulting in Thomas being locked up overnight in the recreation room Rinaldi was finishing off in the basement. However, the Court believes that this confrontation occurred before the test was taken by Thomas, *i.e.*, the night of November 30, the same night that Rinaldi threatened to confine Barbara until she had been tested.

Rinaldi, with his money stolen and his wife's whereabouts unknown, was certainly not in the best of moods, especially considering the liquor and pills he was consuming. Detective Cuff stated that on December 1, Rinaldi brought his wife Joanna (who had apparently returned) to the precinct for questioning around 5:00 p.m. Cuff asked Rinaldi whom he suspected, and Rinaldi told him he had no suspects, and apparently did not mention the lie detector tests already taken. Nor did he give Cuff the list of suspects hereinbefore referred to until December 5, at which time he told Cuff that Barbara was a suspect. Rinaldi then brought Robert and Barbara in for questioning and fingerprinting but Cuff did not see them again until after the kidnapping had taken place. There is no evidence that Cuff ever questioned or fingerprinted any of the Camera boys.

The fact that Rinaldi thought it necessary to question Thomas Camera is illuminating. Rinaldi's list consisted of those people who might have had access to the house during the Thanksgiving weekend. They were primarily close relatives of Rinaldi, except for Basile (his next-door neighbor); the Mellis and Prichard (who were acquaintances of Joanna and familiar with safes), and Robert and Barbara DiMatteo who had possession of Rinaldi's house keys for a period of that weekend. Barbara was the prime suspect. Although they had first met in September 1970 she had become a close personal friend of Joanna's, and Joanna was the only one who knew the location of the safe. The inclusion of Thomas Camera suggests that he had access to Rinaldi's home during the period in question. Barbara had seen Thomas Camera at Rinaldi's house on several occasions, although she did not meet the petitioner, Edward Camera, until one occasion in December 1970. Thomas Camera was approximately 19 years of age at this time, about two years younger than petitioner. Their father had died in 1965 and their mother was a sister of Rinaldi's mother. Thomas had been using some heavy drugs and it appears likely that Thomas may have been placed in some form of protective custody with Rinaldi both before and after Thanksgiving.

At the hearing before this Court, Thomas admitted he was still staying at the Rinaldi house on January 1, 1971. Although he stated that he was tied up during the daytime as well as at night, he admitted that this type of daytime restriction only occurred for two or three days, that he was only confined for 10 days, that thereafter he travelled around at times with Rinaldi, but was free to depart by himself, to go to the movies, and to use the telephone, and only had to spend nights at the Rinaldi house. He admitted that he never phoned the police, nor did he call members of his family because they knew about the situation. Indeed, he had personally talked with family members and they were persuading Rinaldi not to harm Thomas because he didn't have the money and the police were questioning suspects. He testified that the petitioner, his brother Edward, came to see him on two occasions and that he told his brother that Rinaldi was abusing and threatening him and that if he would give Rinaldi a thousand dollars Thomas could leave New York State and return on pain of death. In response, petitioner told Thomas to be calm and let the family see what they could do because Rinaldi was a little crazy at that particular time.

Petitioner testified that he didn't learn of his brother's incarceration until December, probably the middle of the month. When he went over to the Rinaldi house, Rinaldi said he could talk with Thomas, unlocked the door, and locked petitioner in the room with his brother. According to the petitioner, Thomas said that he had taken a lie detector test which had turned out badly, that Rinaldi believed he had stolen the money, that Rinaldi had thrown him in the trunk of the car, and was holding him tied up in the house and threatening to kill him. Petitioner testified he told his brother that he would talk Rinaldi into letting him go, and that their uncle was helping out. Petitioner further testified that he talked unsuccessfully with Rinaldi. Despite petitioner's testimony that he only visited Thomas on one occasion, the Court believes Thomas's testimony that Edward visited him twice. The Court believes that the first visit occurred during the first few days of December during which Thomas may well have been under constraint and the second visit occurred when Thomas had been freed. Barbara had never met petitioner until mid-December in Rinaldi's house.

It is important to note that the only "corroboration" of the imprisonment of Thomas by Rinaldi, other than the self-serving, dubious testimony of petitioner, are two statements made by the victims of the kidnapping who obviously bore no love for Rinaldi at the time the statements were made. On January 11, 1971 in her appearance before the grand jury, Barbara stated that Rinaldi "took the boy, Tommy, prisoner in his home." While Barbara mentioned the date of December 15th, she could not have been referring to the date of imprisonment since it is clear that, if it ever took place, it occurred on November 30 or December 1. At the trial her husband was asked by Lefkowitz whether he knew that Thomas was living in Rinaldi's house for some period of time during June 1970-January 1971. Robert replied that he knew Thomas was held in Rinaldi's house for some period of time. Both petitioner and Thomas admitted they never told Lefkowitz the story of threats, confinement, and bad treatment allegedly suffered by Thomas. Lefkowitz understood Thomas lived with Rinaldi for some period of time because of Thomas's drug involvement.

Finally, before we proceed to the kidnapping, the fact remains that no other member of the Camera family, no aunts, uncles, neighbors or friends of petitioner have testified or supported in any way this tale of threats and imprisonment just recited. Thomas, undoubtedly aware of Rinaldi's hostile actions towards Barbara, has cast himself in a role somewhat similar to and suggested by hers and has transformed the fact that he lived for some period of time under Rinaldi's supervision into a Gothic tale of threats and imprisonment arising out of the theft. It is probably true that Rinaldi did threaten and confine him shortly after he discovered the theft. After all, if Thomas had access to the house over the crucial period, he was automatically suspect. But there was no lengthy confinement and it occurred and was terminated several weeks before the kidnapping. Finally, even if Thomas's and petitioner's story about that confinement were true, it did not warrant a defense of duress.

We turn then to the events during the latter part of December and early January. Rinaldi came into the precinct or phoned Cuff on many occasions until just before Christmas, after which Cuff did not see him again until after the kidnapping. Robert DiMatteo did not see Rinaldi after Robert had submitted to the lie detector test in Rinaldi's basement around December 14, although he apparently did speak with him on the phone to reiterate his innocence. Also, Barbara, while shunning Rinaldi, continued to see Joanna. Apparently the Rinaldis and DiMatteos celebrated New Year's Eve separately. However, during that day Robert called the Rinaldis to wish them a happy holiday and was invited to drop by the Rinaldis' after dinner for a drink.

Barbara and Robert finished dinner and departed together in Robert's car to call on the Rinaldis. A fairly heaevy snow was falling. As they were driving to the Rinaldi house, Rinaldi, accompanied by Thomas, passed them in Rinaldi's car and when they arrived at Rinaldi's house Thomas was parking the car. Thomas got out of Rinaldi's car, opened the DiMatteo car door on Barbara's side, and put a gun to her head. As Robert was getting out on his side, Rinaldi came up with a gun and told him to get back into the car. Rinaldi told Robert that he almost had been fooled, but some girl knew that Robert had taken the money. Rinaldi then started up the car. Robert and Barbara were also in the front seat with Robert in the middle. Thomas sat in the rear seat holding a gun to Barbara's head. They proceeded in this fashion to the Cameras' home. Neither Barbara nor Robert had ever been to the Camera house and were not familiar with it. Rinaldi began blowing the horn, then got out of the car, went up the steps, and came right back. The next thing Robert remembered was that Edward, the petitioner, came out of the house with a gun and a small briefcase. Barbara was then moved into the back seat with Thomas and petitioner took Barbara's place next to Robert in the front seat. After driving away from the Camera house, they opened up the briefcase and placed hoods over Barbara's and Robert's heads, tied tape or rope around their hands and necks and drove around.

Finally the car stopped and Robert and Barbara were dragged out of the car and into an unidentified house. Once in the house, they left Robert alone for a moment, so that he was able to get the hood off his head and to observe the three men forcing Barbara into a barrel and Rinaldi with his foot on the barrel lid. Robert attempted to get to the barrel and free Barbara but was shot by petitioner who was standing right alongside of Thomas at the time. The bullet entered the lower part of Robert's left chest, the wound being about one-half inch in size. The bullet lodged on the third thoracic vertebra right in the back. There is not the slightest evidence that Rinaldi or Thomas directed petitioner to use the gun which Rinaldi had allegedly furnished him, and the shooting occurred within five minutes after Barbara and Robert were brought into the house. It was this act by petitioner that doomed the enterprise to failure. And, as will be seen hereinafter, Thomas was the one who sealed that failure.

After Robert was shot he was taken into another room where he was tied up by Thomas and petitioner. Rinaldi told Robert he would let him and Barbara go if they paid the $65,000—a sum which he then increased to $100,000, an amount he had also mentioned in the car. Robert kept telling Rinaldi he didn't have the money and inquiring about Barbara who, after hearing the shot, had been picked up in the barrel and thrown to the ground by Thomas and petitioner who were kicking her to stop her screaming. Robert asked Rinaldi to untie his hands because he was having difficulty breathing, or at least to open his jacket. Petitioner finally took some scissors and cut Robert's clothes down his back and side and pulled them over to permit him to breathe. Meanwhile Rinaldi had been threatening Barbara with death and refusing to let her see her wounded husband. Rinaldi told her that Robert was bleeding to death, that he had to have the money, and that he was going to kill her in any event. He demanded that she write a note to her father-in-law, Philip DiMatteo, and ask for $58,000 made up in specified $1,000, $500, $100 and $50 denominations. She had to write the note as best she could lying on the floor with her hands tied.

After she had been in the room for about two hours, Rinaldi told her she would have to phone her father-in-law about the money, since he didn't want to deliver the note. She was then brought into a room where she found Robert tied to a chair which was on its back so that he was lying in a pile of garbage with his clothes cut away. Barbara told Robert she was going to call his father, and that everything would be all right. She was then furnished with a telephone on a long extension cord, her hands were untied, and she conveyed the message to her father-in-law as directed. After she had made the call she was permitted to speak further with Robert. Rinaldi asked her whether, if he gave her a knife, she could remove the bullet. Robert begged Barbara to untie him, as he was in pain from the rope and was in shock. Finally Thomas cut the rope from Robert's hands and body and somebody brought ice, which Barbara believed might stop the shock. Barbara begged all three to release her husband to a hospital and keep her until they could get the money they wanted. At first they refused, saying they were going to kill both of them whether they got the money or not, but finally they said they were taking Robert away. Barbara, who feared they would kill or abandon her husband, begged them to leave him with her or take her with them. However, petitioner and Thomas picked Robert off the floor, dressed him, and took him away, but not until Rinaldi had told him that he was being taken to a hospital.

Thomas and petitioner then drove Robert, in the DiMatteo's car, to The Good Samaritan Hospital in Brooklyn. After asking Robert whether he could make it and reminding him that they still held Barbara, petitioner and Thomas left Robert to enter the hospital himself. Robert told the guard at the hospital that he had been shot, a nurse called the police who arrived soon after, and Robert was transferred to Methodist Hospital, where he was taken to the emergency room. While Robert was awaiting X-rays, he was questioned by Detective Muldoon. He first told Muldoon that he was coming out of a bar on Fourth Avenue, that two guys tried to jump him for his money, and that he was shot when he attempted to flee. Muldoon apparently didn't believe this story and eventually Robert changed the locale of the shooting to Staten Island. Later, around 5:00 a.m. on January 2, 1971 Robert had a conversation with Detective Smiley, to whom he told much the same story he had told Muldoon. However, he told Smiley that he wanted to talk to Detective Cuff. Unfortunately, Cuff was out sick and was not contacted until the early afternoon of January 2, whereupon he went to the 122nd Precinct house.

In the meantime, while petitioner and Thomas had gone to the hospital, Rinaldi was alone with Barbara. He took her back to the room where she had originally been confined, put a chair against the door, and sat with gun in hand while Barbara sat in a chair across from him. He continued to threaten her with death, even if he got his money back, stating that he would put her back in the barrel and throw her in the river when petitioner and Thomas returned.

When petitioner and Thomas returned, Barbara was taken from the room where Rinaldi had been holding her, a paper bag was put over her head, and she was taken out of the house and placed in the DiMatteos' car. Thomas Camera drove while Barbara sat between Thomas and Rinaldi. Petitioner was in the back of the car. Some time after they left the house the paper bag, which had presumably been used to prevent her from identifying the house where she had been beaten and confined, was removed. Rinaldi had apparently cooled down at this time and asked her whether she was hungry. They finally arrived at the Manhattan Beach Hotel, with which Barbara was unfamiliar. Rinaldi left the car and at 3:57 a.m. on January 2, 1971 registered for a room. This Court does not know what names were used since the trial exhibits are not available. Shortly thereafter Rinaldi returned to the car and he and Thomas escorted Barbara to a room in the hotel. Petitioner remained alone in the car. Rinaldi informed her that

Thomas would remain with her and see that she received food if she were hungry. She was retied with adhesive tape and placed on the bed. Rinaldi returned to the car and he and petitioner departed. Petitioner's activities thereafter until his surrender to the police are not known.

Thomas lay down on a day bed on the opposite side of the room. He still had the gun but it was in the pocket of his coat which he had taken off. Barbara told Thomas she had to go to the ladies room and that it would be necessary to remove the adhesive taping. Accepting Barbara's assurances that she would behave and not attempt escape, Thomas took a knife and slit the adhesive tapes securing her. Once in the bathroom she tore the tapes off and placed them on the commode or the shelf over the toilet. Thomas and Barbara remained there for several hours and Thomas answered some phone calls. Finally, late in the afternoon of January 2nd after answering a call, Thomas told her that she was being released and that two cabs were being called. Barbara was to take one of the cabs to the 122nd Precinct house and tell Cuff that she had been in a hotel room with a man all night. He gave Barbara $20 for the cab, and they went down to the lobby. Thomas told her to wait while he went to the registration desk some distance away. Barbara, however, ran out of the hotel and jumped into one of the two waiting taxicabs. Thus ended the kidnapping.

We return now, with Robert in Methodist Hospital, to Detective Cuff. The latter, having returned to the 122nd Precinct house and spoken with his superior officer, proceeded with this officer to Methodist Hospital and spoke with Robert. Robert informed him that he had been shot the night before, that Thomas, Edward (the petitioner), and Rinaldi were involved, and that Barbara was still being held. Cuff tried unsuccessfully to reach Rinaldi on the phone. He then called Rinaldi's uncle, Frank Gennaro, and told him that it was imperative that Rinaldi contact Cuff before a deadline of 5:00 p.m. A few minutes before that deadline Rinaldi called Cuff at the precinct house and was instructed to come there. When Rinaldi arrived shortly thereafter, Cuff told him that he had spoken with Robert and that he was in good condition at Methodist Hospital. He also advised Rinaldi that Barbara's whereabouts were unknown and that he felt she was being held somewhere against her will. He told Rinaldi he wanted Barbara at the precinct house by 6:00 p.m. Rinaldi responded evasively and would not use the telephone in the precinct house. At Rinaldi's suggestion, Cuff and another police officer went to a bar about a block away and Rinaldi placed a call out of their hearing. This was the call to Thomas at the Manhattan Beach Hotel, after which Barbara went to the precinct house and talked with Cuff. Cuff went to the Cameras' house but found only Frank Camera there. Subsequently Rinaldi's uncle, Frank Gennaro, brought petitioner and Thomas to the precinct house.

At the hearing in the matter sub judice neither petitioner nor his brother disputed the facts of the kidnapping. Petitioner, however, disclaimed prior knowledge of the kidnapping plans. Petitioner testified that in the evening of January 1, 1971, Rinaldi came to his door and said that he had the DiMatteos in a car, that he had a plan to get the money back, and that he wanted petitioner to participate in the kidnapping. According to petitioner he told Rinaldi that he did not want anything to do with it, but Rinaldi said that he had petitioner's brother, Thomas, in the car and that if petitioner didn't go along Thomas "could possibly get hurt." Petitioner testified that he thereupon got dressed and accompanied Rinaldi. No mention was made of the briefcase containing the hoods or of the adhesive tape. Also, petitioner and his brother maintained that on those occasions during the kidnapping when either or both of them were out of Rinaldi's presence or reach, they made no attempt to break off from the enterprise because Thomas feared that Rinaldi would subsequently find and kill him, and petitioner was afraid that what Thomas feared might really happen.

All three defendants were represented at their arraignment by an attorney by the name of Crecca who was retained by Rinaldi's father. Thereafter they were all represented by Joseph Panzer. It is not clear whether Panzer represented them as a Legal Aid attorney or was retained by Rinaldi's father. In any event, he was discharged because he wanted the defendants to plea bargain, and Lefkowitz was retained by Rinaldi's father. Lefkowitz was concerned about the possibility of a conflict of interest that could result from representing multiple defendants, and he spoke to Panzer about this. At the hearing before this Court, Lefkowitz testified that he initially conferred with each defendant individually to be sure that no defendant was influenced by the presence of the other defendants, and that thereafter he frequently conferred with all of them singly or together. The Court finds this testimony credible, notwithstanding the petitioner's and Thomas's testimony that they never conferred separately with Lefkowitz and that he would only meet with Rinaldi alone. Lefkowitz also conducted his own investigation which, like his conversations with the defendants individually and together, revealed no animosity or conflict between any of the defendants. It is clear that Lefkowitz was not informed of the alleged "duress" by the defendants, or indeed by anybody else. It is also clear just what the defendants did tell him, and what they told him is completely inconsistent with any defense of duress. Because Thomas was one of Rinaldi's suspects in the theft of the money, Lefkowitz made a thorough inquiry into this aspect of the case. He found no disparity, antagonism, or any other indication of conflict.

In reaching this conclusion, Lefkowitz relied on the defendants' representation to him that there had been no kidnapping. His opening statement to the jury in the defendants' criminal case evidences his reliance upon this representation for it is totally inconsistent with any defense of abandonment or duress and suggests no conflict of interest between any of the defendants. Lefkowitz told the jury that he would show that Barbara had been on intimate terms with the Rinaldis for six or seven months, visiting them day and night and having the run of the house, that Barbara and Robert had made a social date to visit the Rinaldis around 9:00 p.m. on January 1, 1971, that Robert had borrowed $10,000 from Rinaldi in 1970, and that the alleged kidnapping was a figment of Barbara's imagination. He referred to the conflicting stories told by Robert to the police, inferring that Robert himself was armed and that Robert told Edward and Thomas to take him to a Brooklyn hospital so that the police would not know that he had a gun and had been shot in an argument with his friends. As for the Manhattan Beach Hotel, Lefkowitz stated that Barbara went there willingly to spend the night with Thomas, that they had breakfast and luncheon together in the room, and that they subsequently left in separate cabs. The tenor of Lefkowitz's opening statement was that at a prearranged social visit an argument had occurred over money which the DiMatteos owed Rinaldi, and that Robert had been wounded accidentally with his own weapon and therefore told the police he had been mugged by unknown persons in Brooklyn. As for Barbara, she was having an affair with Thomas. Neither Lefkowitz, nor the Assistant District Attorney, Philip Minardo, mentioned in their opening statements the alleged theft of money from Rinaldi's house, although Minardo stated that he would show the reason for Rinaldi's $100,000 demand, later reduced to $58,000.

Lefkowitz's strategy during the trial was consistent with his opening statement. In his cross-examination he attempted to attack the credibility of Robert and Barbara, with particular emphasis on Barbara. The brief testimony he elicited from his defense witnesses was designed to show that Barbara's confinement in the hotel was a voluntary affair with Thomas and that Barbara and Robert were having marital difficulties.

The trial commenced on June 2, 1971 before Supreme Court Justice Vito J. Titone (presently an Associate Justice of the Appellate Division, 2nd Department). Throughout the trial Justice Titone was suffering from a surgical wound in his back. Therefore, certain conferences were held in his chambers which were air-conditioned rather than in the courtroom itself which was hot and uncomfortable.

At the inception of the trial a fifteen-minute recess was called and Lefkowitz asked Justice Titone to permit the defendants to remain in the courtroom so that he could confer with them in the presence of their wives. Permission was granted and the recess consumed some 50 minutes, rather than the 15 minutes originally fixed by the court. According to petitioner, this first conference during the trial involved plea bargaining. It did not prove fruitful. The defendants had confidence in Lefkowitz who had a good reputation as a criminal trial lawyer and who believed that he could secure an acquittal since he was opposed by an Assistant District Attorney trying his first case.

Robert DiMatteo was the first witness for the prosecution. He completed his direct testimony and cross-examination on June 4, the third day of the trial, after several recesses had been called. After some 5 minutes of testimony by the detective who took the initial statement by Robert at the hospital, the trial was adjourned by Justice Titone for reasons of his personal health.

The trial reconvened on Monday, June 7, and Barbara DiMatteo was questioned by the prosecution. This questioning was interrupted by a conference at the side-bar at which Minardo, the prosecutor, stated that he wanted to put in evidence certain articles which were found in the Manhattan Beach Hotel room. Also, Lefkowitz requested that he be furnished with certain statements made by Barbara DiMatteo as well as her grand jury testimony. Justice Titone declared a recess and suggested that, with the consent of the defendants, the attorneys would meet in his chambers to mark any statements or grand jury minutes for identification and to allow Minardo to make an offer of proof as to any exhibits. The defendants' consent was voiced by Lefkowitz and this procedure was followed. Present in chambers were Justice Titone, Lefkowitz, Minardo, and a court reporter. The defendants had been remanded to the holding pen downstairs.

This conference on June 7 in Justice Titone's chambers is highly significant. The parties discussed introducing into evidence the sweater which Barbara had been wearing the night of January 1 and while at the hotel on January 2, as well as the adhesive tape used to constrain her which she had removed and left in the bathroom where it had been recovered by police on the evening of January 2. A Coca-Cola bottle bearing Thomas's fingerprints was also recovered. However, it was the sweater and tape, the latter bearing scientifically identified fibers from the sweater, that would constitute physical corroboration of Barbara's testimony that her hands were taped and that she was otherwise restrained at the hotel where she remained for over 12 hours. Lefkowitz was fully aware of the implications and asked Justice Titone if he could have the parents and the wives speak with him to the defendants prior to the lunch hour. When Justice Titone asked the purpose of such a conference, Lefkowitz replied:

> Well, Your Honor, I told you from the very outset of the possibility that I felt a possibility of conflict of interest of these people, and I have come here early this morning, and went down to the lockup for this very purpose. And although they say to me one thing, I want them to say it in front of the parents and the

> wives, so that there wouldn't be any question about it, *because I am counseling them that there could very well be a conflict if they are not telling me the truth.* This is all in connection, Judge, with what I have related to you and to Mr. Minardo from the very beginning about the possibility of a plea.

Trial Transcript, at 250 (emphasis added). Justice Titone indicated that he would accept a plea to a lesser offense *if* all three defendants plead guilty. It was not an individual offer. His position was "either all take the plea or there is no plea." Transcript of Habeas Corpus Hearing, at 153.

Justice Titone then ordered that the defendants be brought up to the courtroom and asked Lefkowitz which wives and parents would be present. Lefkowitz replied that Rinaldi's mother and father, the wives of Rinaldi and Edward Camera, and one Camera parent, *i.e.,* Mrs. Camera, would attend. The court recessed shortly before 12:30 for luncheon, and Lefkowitz conferred with all three defendants and these other individuals. Neither Thomas nor petitioner now denies that such a conference took place. Indeed, petitioner claims that he wanted to plead, but that his aunt (Mrs. Rinaldi) stopped Lefkowitz and asked him whether such a plea would hurt the other defendants. After Lefkowitz's affirmative response, petitioner told Lefkowitz to forget about the plea. Petitioner testified that following the meeting with the wives and parents, the defendants were returned to the holding pen and that Lefkowitz came down to confer with them further. According to petitioner, Rinaldi screamed at Lefkowitz, saying that he wanted to go to trial and that if he wanted to plead he could have done so with Panzer. Lefkowitz tried to persuade the defendants to take the offered plea, and told them that if anyone wanted to take a plea and the others did not, they would have to get another attorney.

After the luncheon recess on June 7, further testimony was heard from Barbara DiMatteo and from a police expert who drew a connection between Barbara's sweater and the fibers on the adhesive tape. The trial continued over the next three days. On June 8 a *Huntley* hearing was held with respect to statements or incriminating acts by Rinaldi which were to be referred to in the testimony of Detective Cuff. The motion to suppress was denied by Justice Titone. The prosecution concluded its case on that day.

Lefkowitz called only four witnesses: a porter and security man at the Manhattan Beach Hotel; the desk clerk at the hotel; Rosetta Esposito, a friend of the Rinaldis, whose testimony was designed to implicate Barbara as the person who stole the money from Rinaldi's safe; and Joanna Rinaldi who was called to testify, among other things, that Barbara had a boyfriend and was going to leave Robert. Although mention was made about the alleged theft from Rinaldi, the obvious purpose was to discredit Barbara. Joanna completed her testimony on the morning of June 9. The following day, Lefkowitz and Minardo made their closing arguments, the jury was charged, and a verdict was returned late that evening. All three defendants were found guilty of kidnapping first degree (under the third count of the indictment charging the abduction of Barbara DiMatteo and her detention for the purpose of terrorizing), kidnapping second degree (two counts), assault second degree and petit larceny.

Although this Court has already considered the question of multiple representation in an Opinion dated February 13, 1979, certain other findings appear appropriate in light of the hearing held subsequent to that Opinion. The Court finds that both Lefkowitz and Justice Titone advised the defendants and their families of their right to separate counsel and their right to change counsel. After all, Lefkowitz was the third attorney to represent them in the criminal proceeding. At the time he was retained by Rinaldi's father, Lefkowitz was representing Thomas Camera successfully in a case involving charges of smuggling untaxed cigarettes from the South. Although the defense was that no kidnapping had taken place, and therefore no conflict could exist between the individual defendants, the defendants and their families were cautioned both by Lefkowitz and by Justice Titone of the possibility of such a conflict. Petitioner relies on his own testimony and that of his brother, Thomas, in asserting that he was never properly informed of the potential conflict problem. No member of either family was called to support petitioner's claims, some of which were contradicted in his own and in his brother's testimony. Petitioner relies upon the fact that the state court record does not indicate that Lefkowitz communicated his concern about a conflict of interest directly to the defendants, although the record reflects that Lefkowitz voiced this concern at the June 7 conference in chambers. Yet statements made by Justice Titone, Lefkowitz, and Minardo when they testified at the habeas hearing before this Court support the opposite conclusion. Minardo testified to a meeting in chambers in addition to the meeting on June 7 hereinbefore referred to. At that meeting Justice Titone, Minardo, Lefkowitz and the three defendants were all present, and possibly members of their families. Minardo testified that Justice Titone told each defendant that he had the right to have his own attorney. This testimony is consistent with that provided by Justice Titone and Lefkowitz.

The verdict of the jury did not conclude the matter, for on March 16, 1972—some nine months after the trial—a hearing was held before Justice Titone for a new trial. At this hearing, at which Minardo appeared for the prosecution, Lefkowitz continued to represent Rinaldi and Thomas Camera. However, Daniel Leddy, Esq. represented petitioner Edward Camera, having been substituted for Lefkowitz on July 15, 1971. It appears that around July

14, 1971 Robert DiMatteo had a meeting with Rinaldi's mother in order to find out certain personal matters about his wife Barbara with whom he was in the process of obtaining a divorce. While he was there Rinaldi's father came in and he subsequently saw Rinaldi's father at Rinaldi's wife's (Joanna's) house. Robert told Rinaldi's father that he wanted to get back at Barbara and that he would try to help Rinaldi get a new trial. Thereafter, on July 21, 1971, Robert, who had not been in communication with Lefkowitz since the trial, went to Lefkowitz's office where he wrote out a statement in his own handwriting and signed it. This statement read as follows:

> July 21, 1971. 1:10 p.m. My name is Robert DiMatteo. I live at 126 Henry Place, Staten Island, New York. I am 34 years old. I am married. I am a house painter by trade. I am presently unemployed, I am making this statement about an incident that was January 1, 1971 to both my wife and myself. After reviewing all the facts, I am firmly convinced that my shooting on that date was completely accidental, that there was no intent or design on anyone's part to harm me. Furthermore, the fact that I was taken to a hospital in Brooklyn was at my own insistence and request. I later had a conversation with my wife Barbara who had been at the Manhattan Beach Hotel in Brooklyn at the time I was in the hospital. She stated to me that Thomas Camera, who was with her, slept most of the time and actually she could have left the hotel under her own power just about any time she wanted to. That is what convinced me that at no time no true kidnapping really existed. Also, sometime during the month of April, 1971, my wife [and I] separated from each other by mutual agreement. We have not lived together since, and at present I have retained an attorney who has filed papers for divorce during the trial. When my wife testified that we were

living together, it was not so, in retrospect. It was not so. In retrospect, I have reviewed all of the circumstances, and I firmly believe all of this entire incident foolishly started because of a money loss by Nick Rinaldi, who always has been a good friend and business associate, and I still believe he is. Both my wife and I were never subjected to any harm or ill treatment.

I make this statement freely and voluntarily in an effort to help right an apparent wrong. I have not been intimidated, threatened, or coerced, nor have I received any compensation, financial or otherwise, nor do I expect to receive any. I have read this entire two-page statement, and it is completely true.

Sgd. Robert DiMatteo, 126 Henry Place

At the hearing before Justice Titone Robert testified that the entire statement, so far as it was material, was false and that he wanted Rinaldi and the Cameras freed because Barbara was desperately afraid of them. In addition, testimony was introduced in an attempt to show that one of the jurors had a son who had attended school with one of the Camera boys. However, the juror in question testified that he had not learned of this until after the trial. Justice Titone denied the motion for a new trial.

The Court has referred to this incident in part to show that at least two of the defendants still retained Lefkowitz. More important, however, is the content of Robert's written statement, which was based on his conference with Joanna and Rinaldi's father. This must have been, in substance, the story which Rinaldi told his wife and father, the same story which was told to Lefkowitz when Rinaldi's father retained him and when he spoke to all three defendants. This was, in substance, Lefkowitz's defense, and the jury did not buy it. Completely missing from this defense is any reference to abandonment or duress, not because Lefkowitz wanted to protect Rinaldi from the duress charge, but because none of the defendants or their families ever informed him about any duress. Duress as a defense was born some yers later in Green Haven prison. Let us follow the court proceedings over the years, particularly in the federal court.

Petitioner first moved in the state court in July 1976 to vacate his conviction pursuant to §440.10 of the New York Criminal Procedure Law. Petitioner alleged that he was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments because of the multiple representation. This was the same ground alleged by his brother, Thomas, in the federal court before Judge Motley that same year. However, unlike Thomas, petitioner further alleged that the joint representation gave rise to an actual conflict of interest, namely, that a separate defense available solely to petitioner had not been pursued because it would have worked against the interests of his codefendants. That defense was in the nature of abandonment or withdrawal, *i.e.*, petitioner left the venture before Barbara DiMatteo was detained at the hotel and therefore could not have been guilty of kidnapping first degree under the third count. Petitioner contended that Lefkowitz could not pursue this defense because it was inconsistent with the codefendants' defense that Barbara had gone to the hotel willingly. Petitioner also contended that Justice Titone was advised of a possible conflict of interest and failed to make an inquiry or tell petitioner that he had the right to separate counsel.

The motion to vacate the judgment was denied in October 1976 by New York State Supreme Court Justice Radin. Petitioner moved for reargument in February 1977 and in May 1977 Judge Radin granted reargument and ordered a hearing. At the outset of the hearing, however, the decision to grant reargument was retracted upon information that the Appellate Division of the State Supreme

Court had unanimously affirmed the judgment of conviction. The State Court of Appeals subsequently denied leave to appeal.

In his original petition in this Court, filed *pro se* on July 26, 1977, after his unsuccessful resort to the state court, the petitioner alleged, in effect, that Lefkowitz never raised a defense available to petitioner alone, *i.e.*, that petitioner had vanished from the scene of the crime before Barbara DiMatteo was held in the hotel, did not know that she was to be confined, and was not responsible for the actions of his codefendants during that period. This, of course, was just what he had alleged in the state court. Counsel having been appointed for petitioner, this Court denied the writ, without a hearing and on the basis of the state court record, in an Opinion dated February 13, 1979. The delay in disposing of the original petition was occasioned by the fact that late in 1976 petitioner's brother, Thomas, had petitioned for a writ in this court and that matter had been assigned to Judge Motley (*Thomas Camera v. Roy Bombard*, 76 Civ. 3766). Thomas raised only one constitutional claim—that he had been denied effective assistance of counsel required by the Sixth and Fourteenth Amendments because he, his brother (petitioner herein) and Rinaldi were all represented by one attorney both during the trial and during the pretrial proceedings. In a memorandum opinion and order dated August 24, 1977, Judge Motley declined to order an evidentiary hearing and stated that the petition would be dismissed with prejudice within thirty days unless petitioner (Thomas Camera) filed with the court an affidavit detailing the specific facts showing actual prejudice to him by the multiple representation.

Thomas Camera then secured Legal Aid counsel, Paul Casteleiro, who in December 1977 visited both Thomas and petitioner herein at Green Haven State Prison where they were both confined. Although Casteleiro was representing only Thomas, he did examine a copy of petitioner's original papers in the instant proceeding then pending before this Court. It was at this conference at Green Haven and one conducted there soon after that the failure to raise the defense of duress on behalf of Thomas originated as a specific factual basis of prejudice resulting from the joint representation. Once again the matter was presented to Judge Motley, this time with the specific allegations that Thomas had himself been held captive by Rinaldi prior to the kidnapping and that Thomas had acted under duress. However, Judge Motley in a memorandum opinion and order dated June 27, 1978 found that the failure to raise the defense of duress had not been presented to the state court and dismissed the petition for failure to exhaust state remedies. Thomas thereafter returned to the state court and moved to vacate his conviction pursuant to §440.10 of the New York Criminal Procedure Law.

The original denial of petitioner's writ by this Court on February 13, 1979 was predicated on the failure to prove actual prejudice to petitioner by reason of the joint representation. Petitioner argued that he alone had a defense to the third count of the indictment, because there was no evidence that he actively participated in restraining Barbara DiMatteo during the period she was at the Manhattan Beach Hotel. However, according to petitioner, his lawyer Lefkowitz could not raise this defense because the defense strategy was to argue that Barbara went to the hotel willingly. The absurdity of this contention by one who had participated in the original restraint of the DiMatteos was discussed fully by this Court in its opinion of February 13, 1979, and will not be repeated herein. It is sufficient to note that even if we accept petitioner's contentions, he would not have established a valid defense. *People v. Ozarowski,* 38 N.Y.2d 481, 381 N.Y.S.2d 438, 444-45 (1976).

On April 11, 1979 a hearing was held in the New York State Supreme Court on Thomas Camera's §440.10 petition. The petitioner herein was present for the purpose of corroborating his brother's charge of duress. When the case was called, the court was advised that the state would consent to Thomas's motion to vacate the judgement of conviction. In explaining the basis for this consent, the Assistant District Attorney, George McVay, stated:

> MR. MCVAY: Your Honor, that is correct in regard to the 440 motion, and I would like to take a moment to explain the reasons for the People's position. One of the major issues raised in the 440 motion by Mr. Thomas Camera at this point is that warnings of the risks of representation at the time of trial by one lawyer of three defendants was not given on the record, and I have thoroughly perused the recorod and find that there is no direct indication that any warnings were given on the record. I do, however, have information that such warnings had been discussed, and the risks had been discussed between the Court, the Prosecutor and the Defense Attorney at the time. There is also an indication, your Honor, that these risks and warnings had been transmitted to the Defendants, all of them, including Mr. Thomas Camera, however, this does not appear on the record. Mr. Camera's situation relative to his other two codefendants in this case is a very unique situation relative to the other two men. In proceedings before the Federal Court, the Eastern District of New York, Mr. Camera, Mr. Thomas Camera raised the issue for the first time of an alleged defense of duress, an affirmative defense that he would have had relative to an event that occurred between himself and Mr. Rinaldi, who was another codefendant, just before the alleged crime took place. In light of the fact that I have information that the Defense Counsel in this case was paid his fee by the Rinaldis, by the Defendant Rinaldi's father, and

> because the case law as I understand it treats incipient conflicting defenses, even if there is no transmittal of that fact, of the facts that would constitute a defense such as duress to the defense counsel, or even if it wasn't recognized by the Defendant himself, the cases point to the fact that in such a situation it is quite likely that the result, and particularly here with this 440, that a new trial would be ordered. For the reason that the People do not wish to take the risk of going through a 440 hearing at this time in regard to this one Defendant and his unique status is the reason for the People recommending that his motion be granted in this respect. It is my further understanding, that as part and parcel of the People's consent to a granting of the motion, that the Defendant Thomas Camera will enter a plea before your Honor at this present time.

Thereafter, Thomas pleaded guilty to a class B kidnapping felony (2nd degree) on the representation that he would receive an indeterminate sentence not to exceed seven years, and was paroled to await sentence.

At the conclusion the Assistant District Attorney made the further statement which follows:

> MR. MCVAY: Your Honor, I also have three other things to say in regard to the People's reason for consenting to the initial granting of the 440 motion. I stressed initially that Mr. Thomas Camera is unique insofar as the potential, although we don't concede the potential of the issues that were raised in his application in 440 as opposed to his other two codefendants, and also full perusal of the record and the statements of the complaining witnesses in this case reveal that the participation of Mr. Thomas Camera as opposed to the other two defendants in this case was substantially less, to wit, one of the other Defendants shot one of the complaining witnesses during this episode, and

> the other codefendant Rinaldi was the instigator and ringleader of the situation. For those reasons I would ask to be added to the original recordo as the reasons the People consent.

Not surprisingly, this favorable result achieved by Thomas in April 1979 prompted similar action by his brother Edward, the petitioner. In March 1979 petitioner, who was now represented by counsel, appealed from this Court's Opinion of February 13 that denied his original writ. This appeal, however, was not pursued. Instead, in August 1979, more than a year and a half after petitioner learned of the duress defense and after having failed as to the defense of abandonment, petitioner requested a rehearing of his petition which this Court had denied the past February. He realleged that the multiple representation by Lefkowitz had deprived him of effective assistance of counsel. This time, however, petitioner dropped the claim that his abandonment defense was sacrificed; indeed, he was foreclosed by his failure to perfect his appeal. Instead he replaced it with the following alleged incidents of prejudice: (1) Lefkowitz and Rinaldi held private conferences from which petitioner (and his brother) were excluded; (2) they devised a trial strategy, *i.e.*, that there had been no kidnapping, which was the defense most beneficial to Rinaldi; and (3) Lefkowitz suppressed the defense that petitioner and his brother participated in the kidnapping under duress because that would have conceded the fact of the crime and established Rinaldi as the culprit.[1]

As has been indicated, the duress exerted on petitioner was allegedly the following. Petitioner's brother Thomas was a captive in the Rinaldi house. Rinaldi suspected Thomas of having stolen the money from the safe. Rinaldi told petitioner that if he did not participate in the kidnapping, something would happen to his brother. Petitioner complied because he feared for his brother's safety.

This Court need not determine whether these assertions are true, although it is worth noting that the Court doubts the validity of much of the testimony provided by petitioner and his brother. The question before this Court is whether petitioner's Sixth Amendment right to effective assistance of counsel was violated as a result of Lefkowitz's conflict of interest in representing multiple defendants. The requisite elements of such a claim were recently described by the Supreme Court in *Cuyler v. Sullivan*, 48 U.S.L.W. 4517 (U.S. May 12, 1980). The *Cuyler* Court stated that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an *actual conflict* of interest adversely affected his lawyer's performance." *Id.* at 4521 (emphasis added). A defendant who shows that his representation was "actually affected" by a conflict of interest "need not demonstrate prejudice in order to obtain relief." *Id.*

To elucidate its holding, the Court compared two previous conflict-of-interest decisions. In *Glasser v. United States*, 315 U.S. 60 (1942), the record showed that the defense counsel failed to cross-examine a particular prosecution witness and failed to object to the introduction of arguably impermissible evidence. As stated by the *Cuyler* Court, "both omissions *resulted* from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's 'struggle to serve two masters [could not] seriously be doubted.' " 48 U.S.L.W. at 4521, *quoting* 315 U.S. at 75 (emphasis added). The Court contrasted this case with *Dukes v. Warden*, 406 U.S. 250 (1972), in which a defendant argued that his lawyer's conflict of interest tainted his guilty plea. The defendant had plead guilty on the advice of two lawyers, one of whom also represented his codefendants on an unrelated charge. This lawyer later sought lenient treatment for the codefendants on the ground that their cooperation with the police had induced the defendant's plea. The Court in *Dukes* found nothing in the record indicating that the alleged conflict led to ineffective assistance of counsel or rendered the plea involuntary or unknowing. *Id.* at 256. In the words of the *Cuyler* Court, "[s]ince [the defendant] did not identify an actual lapse in representation, we affirmed the denial of habeas corpus relief." 48 U.S.L.W. at 4521.

Applying these principles to the case at bar, this Court finds that petitioner has failed to establish that a conflict of interest actually affected the adequacy of his representation. An attorney is not a psychic; his performance cannot be "actually affected" by conflicting interests that are unknown to him and remain undisclosed. This was precisely the situation here, for Lefkowitz was never apprised of the alleged facts that purportedly gave rise to a conflict of interest. Neither petitioner nor his brother, nor anybody else, informed Lefkowitz of the allegations constituting the supposed duress. Lefkowitz knew only that Thomas was involved with drugs for a time and that he was being taken care of by the Rinaldis. When Robert DiMatteo was on the witness stand Lefkowitz asked him if he knew that Thomas had lived in Rinaldi's house for some period of time between June 1970 and January 1971. Robert answered in the affirmative and Lefkowitz immediately changed the subject. His failure to pursue this topic further, however, stemmed not from his desire to protect Rinaldi but from his attempt to avoid prejudice toward Thomas and a possible mistrial if Robert elaborated and mentioned Thomas's use of drugs in front of the jury. It is true that Barbara stated before the grand jury that Thomas was being held in Rinaldi's house. Yet Lefkowitz did not receive a copy of the grand jury minutes until the luncheon recess on June 7 while he was attempting to get his clients to plead, and it is unlikely that he had an opportunity to carefully examine them at that time. In any event, he could certainly not invite Barbara to open up such an exceedingly dangerous subject as Thomas's drug habit.

Furthermore, even though Lefkowitz was never informed of the alleged facts giving rise to the purported conflict, he recognized that such a conflict could exist in representing multiple defendants. The record indicates that he expressly discussed this possibility with Justice Titone. Although petitioner contends that he was not apprised of the potential conflict situation, the Court has heard ample testimony discrediting this contention. Petitioner was repeatedly told that he could have separate counsel and that he should make his own decision with respect to the plea offer. It also appears that petitioner was present during some discussions about whether Lefkowitz should continue to represent all three defendants. Furthermore, Justice Titone testified that at one point he suggested to the defendants' parents that separate counsel should be obtained.

In *Cuyler*, the Supreme Court stated that "[a]bsent special circumstances, . . . trial courts may assume that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 48 U.S.L.W. at 4520. In this case, neither the judge nor defense counsel was informed of the allegations that allegedly created a conflict. Nevertheless, both of them asked the defendants on more than one occasion whether they wanted to proceed with the multiple representation. Justice Titone also explored the issue with defense counsel and was satisfied that the representation complied with the defendants' wishes. *Cf. Holloway v. Arkansas*, 435 U.S. 475 (1978) (defendant's Sixth Amendment rights are violated where trial court refuses to consider the appointment of separate counsel despite defense counsel's timely assertions that his clients' interests conflicted).

Finally, as amply demonstrated by this Court's description of the case, petitioner would not have been entitled to a duress defense charge at his criminal trial because the facts presented did not support such a defense. The "minimal threshold of evidence" that would warrant a duress defense charge was recently described in *People v. Irby,* 61 A.D.2d 502, 402 N.Y.S.2d 847 (1st Dept. 1978), *modified on other grounds,* 47 N.Y.2d 894, 419 N.Y.S.2d 477 (1979), where the court stated:

> [w]hether the defendant lacked the subjective *intent* to aid and abet MacKenzie because he allegedly coerced and "smacked" her can only be determined by the *objective manifestations* of her actions; every single one of her actions was *unequivocally* and thoroughly referable only to an intent to aid and abet MacKenzie and demonstrated that she was not acting under the siege of "duress." Thus, the minimal threshold of evidence was not met in this case to warrant the charge. Hence the trial court quite properly refused to charge the defense of duress.

(Emphasis in original). Like the defendant in *Irby*, all of petitioner's actions were clearly referable to an intent to aid and abet Rinaldi's scheme. Indeed, it was petitioner who shot Robert DiMatteo and none of the testimony suggested that he was urged by Rinaldi to pull the trigger. No duress was evidenced by the "objective manifestations" of petitioner's actions. Since the trial court would have "properly refused to charge the defense of duress," petitioner cannot now complain that he was deprived of the defense as a result of his attorney's conflict of interest. The facts of this case—and not any alleged conflict—completely undermine petitioner's duress theory and he would not have been entitled to the charge at his criminal trial.

In addition to his duress defense argument, petitioner contends that Lefkowitz failed to argue that he could not be found guilty of kidnapping in the first degree because he did not have the specific intent to seek ransom from another person (counts I and II) and neither participated in nor was cognizant of the plan to restrain the victim for more than twelve hours with intent to terrorize her (count III). These arguments, however, suffer from the same deficiency as petitioner's duress theory. To establish a constitutional violation, petitioner must demonstrate that these omissions resulted from an actual conflict of interest. Lefkowitz, however, could not have experienced such a conflict unless he was informed that the petitioner disagreed with the contention that no kidnapping had occurred and wanted to disassociate himself from Rinaldi and his brother. Nothing in the record indicates that Lefkowitz was so informed; indeed, all three defendants stuck to the story that there had been no kidnapping. Although petitioner might have benefited from a different defense strategy, there is no evidence that Lefkowitz's failure to pursue that tack resulted from a "struggle to serve two masters." *Glasser v. United States, supra,* 315 U.S. at 75. The defense presented resulted not from any conflict of interest but from the information provided by the three defendants.

Finally, petitioner argues that Lefkowitz should have tried to obtain a separate plea bargain for him by pointing out the distinctions between petitioner and his codefendants and arguing that petitioner should be entitled to plead guilty even if his codefendants were not so inclined. Not only is this argument highly speculative, but it is unsupported by the record. Justice Titone testified that he told Lefkowitz that he would only accept a plea to a lesser offense if all three defendants agreed to the bargain. According to petitioner, at one point he indicated that he would accept the plea but then changed his mind when Lefkowitz, in response to a question from Rinaldi's mother, stated that this would hurt the other defendants. Even assuming this is true, Lefkowitz did inform the defendants that they could obtain separate counsel and attempt to strike individual bargains. No conflict of interest is evidenced by Lefkowitz's decision not to challenge Justice Titone's offer, particularly when such a challenge may well have antagonized an obviously sympathetic judge.

In conclusion, the Court would like to reiterate an observation made by Justice Titone at petitioner's habeas corpus hearing. This case truly resembles the story of "the gang that couldn't shoot straight" and it is unfortunate that such young men had to receive sentences of fifteen-years-to-life when they could have plead guilty to a lesser offense that carried a zero-to-three-years sentence. And while petitioner's brother was given a second chance by the state to plead to a lesser offense and be sentenced to time served, the petitioner had been afforded no such opportunity. Even though this Court has found no constitutional violation, such lenient treatment may well be warranted in petitioner's case and an appeal to the state's clemency powers might be appropriate now that petitioner has exhausted his other state remedies.

The Court deplores the notion that an immature young man must serve such a long sentence for participating in what were essentially amateur-hour antics. Yet his conviction was secured by constitutional means and his attorney's performance was not adversely affected by a conflict of interest. Petitioner was given more than one chance to obtain different counsel and he has now taken full advantage of the various mechanisms for challenging his conviction. Finding no constitutional infirmity in that conviction or petitioner's trial, this Court must deny his application for habeas corpus relief.

So ordered.

Dated: New York, New York
February 24, 1981

Charles H. Tenney
U.S.D.J.

FOOTNOTE

1. Although the specifics of this claim differ from the abandonment theory presented to the state courts, both allege Lefkowitz's conflict of interest as the basic constitutional infirmity in petitioner's conviction. Accordingly, petitioner has satisfied the exhaustion of state remedies requirement with respect to this claim. *See Smith v. Regan,* 583 F.2d 72, 75 n.1 (2d Cir. 1978); *United States v. Mancusi,* 457 F.2d 463, 467 (2d Cir. 1972).

APPENDIX C—AUTHORIZATION FOR SUBSTITUTION OF COUNSEL FOR PETITIONER

MEMORANDUM

TO: Solicitor General Shirley A. Siegel

FROM: Robert A. Forte, Assistant Attorney General

DATE: October 15, 1981

SUBJECT: Camera v. Fogg

This is to confirm that I have informed George McVay of the Richmond County District Attorney's Office that he is authorized to act as counsel for respondent-appellant on the *Camera* petition to the Supreme Court for a writ of certiorari. It is understood by Mr. McVay that the Attorney General does not join in the petition and, therefore, it is only the District Attorney who will appear on the papers.

Respectfully submitted,

Robert A. Forte
Assistant Attorney General

PD

APPENDIX "D"
FULL HEARING TRANSCRIPT OF JACOB LEFKOWITZ

P.M. SESSION

(2:10 p.m.)

MR. COHEN: Petitioner rests.

MR. FORTE: At this point I would like to make a motion or an application to have the motion of petitioner for rehearing dismissed on the ground that there has been a failure of evidence; that although we have not gotten into it at this part of the hearing so far, the question of whether or not there was an inquiry into the conflict through multiple representation; that even so under the most recent Supreme Court ruling in Cuyler the petitioner has the burden of establishing both the existence of the conflict and some prejudice deriving therefrom and I feel that he has failed to make that case.

THE COURT: I will reserve on that.

MR. FORTE: At this time I would like to call Mr. Lefkowitz.

JACOB P. LEFKOWITZ, called as a witness by Respondent, was duly sworn and testified as follows:

DIRECT EXAMINATION BY MR. FORTE:

Q. Mr. Lefkowitz, just preliminarily, to expedite matters, are you now a practicing attorney in the State of New York?

A. Yes, sir.

Q. For how long have you been practicing?

A. Since 1936.

Q. And do you consider that you have a certain area in which you specialize in in the practice of law?

A. Yes, sir.

Q. What is that?

A. Criminal law and tax law.

Q. How long have you been practicing criminal law, Mr. Lefkowitz?

A. Specifically since I was admitted to this district of the United District Court in 1947.

Q. Now, did there come a time, Mr. Lefkowitz, when you represented the petitioner, Edward Camera?

A. Yes.

Q. When was that?

A. My best recollection is 70 or 71.

Q. Did you represent anyone else in connection with that case?

A. There were three defendants, Rinaldi and two Cameras. One was Tom, one was Edward. I don't remember which one was the younger one.

Q. Could you tell the court, if you remember, how you came about being the attorney representing these three different defendants in this matter?

A. The father of Rinaldi was a person that I had met on various occasions through, I believe he worked for a company that I represented for a number of years, and that's how I knew Mr. Rinaldi senior and he called me about this case. He's the one who initially came up with the clients at that time; proposed clients, the defendants in question.

Q. Was he the one who paid the fee for the representation?

A. I beg your pardon?

Q. Was he the one who paid the fee, if you recall?

A. My best recollection is that he assured me that he was responsible for the fee and he was the one who did pay me the fee.

Q. In your mind, did this pose any problems for you in terms of your representation of the three defendants?

A. Before I decided to accept this case, I spoke to the three individuals in my office, ascertaining the facts. They were also at the time represented by another lawyer and I spoke to him and after speaking to the three of them for the specific purpose of learning what the facts were all about, I then went into the question as to whether any one of them had a possible conflict with any of the others.

I found no possibility of any conflict from my discussion with the three of them and individually and I decided to proceed with the case.

They had not wanted to go along with a disposition of this case by way of plea, which the former lawyer had suggested. And I saw the possibility of a successful defense of this case and though the charges were extremely serious, as I recall it, I believe they were all charged with class A felonies. I think there were some misdemeanors, too, I think.

But the circumstances were such that in my humble opinion, I felt that I could bring out to the jury the speciousness of this alleged kidnapping with which they were charged with and that it was all a ridiculous sort of composite of facts which unfortunately brought these charges and necessarily brought these charges because factually and as to the letter of the facts there was a kidnapping, alleged.

Q. Did there come a time in the course of your representation of the defendants when you altered your opinion, your evaluation of the merits of the case?

A. We proceeded to trial. It was a jury trial that took place in Staten Island, and after a number of days, I don't recall how many, the trial was progressing as we defense lawyers like to judge, going well or going poorly.

it was going well in my humble opinion until a point where a detective of the New York City police produced physical evidence that the tape with which the victim, one of the victims, I believe it was the wife of the other victim, the tape which had been found in the room in which she claimed she had been kept in that night, that laboratory testing showed the hairs on this tape adhesive matched the sweather which she wore that previous day and which was in evidence.

Q. What did you conclude from this?

A. Well, this was very damaging and for the first time in my opinion at this trial there was physical evidence which was very effective for the prosecution.

Q. What did you do at that point?

A. I discussed with the three defendants—I must backtrack just for a moment. When this occurred, I spoke to the assistant district attorney, Philip Minardo, I believe was or is his name, about the possibility of getting a disposition of this case at this stage of proceedings and what could I possibly get for my clients.

He was not opposed to it but of course he couldn't tell me what the judge would do. I had a discussion with Judge Titone, I believe it was, who tried the case and he was very, very amenable to a disposition at this late stage and I was, very frankly, very well taken with that and I explored what he would do.

Well, I can't state with absolute certainty whether I was offered a class E or a class D felony but I do remember this. I have a distinct recollection of this, that the judge told me and that's why I think it was an E felony where that charge carries a maximum of four years. He said to me, Mr. Lefkowitz, that doesn't mean that I have to give them four years. They could do less than that and three of them could be out within one year, if their probation reports are okayed.

When I heard that, I asked the judge, as I recall, I think their bail had been revoked and they were in jail and there was a lock up type of jail in the basement of that Supreme Court building, where it was rather difficult to conduct any kind of conference.

I asked the judge if he would permit me that afternoon during the noon recess to have the use of the courtroom for a conference with the defendants. I asked permission to have their relatives present. He did grant me this request.

I remember that there was the wife, I believe, of one of the defendants, it must have been the older Camera. I think it was his wife. There was the father of Rinaldi and I believe his mother. I don't recall if anyone else was present.

I spent the entire hour with them, pointing out the severity of sentence that would come about if the jury brought in a conviction on a first degree kidnapping charge; that the sentence would be mandatory; that from my opinion of the evidence as it went in at this point, no matter what I did, I told them I have been doing the best I could in my humble opinion and I will continue to do so, but I think from this point on I would be pushing spaghetti with my nose uphill all the way for them.

So I bore down on the lightness of sentence which was indicated to me would be afforded to them if they had indeed accepted some positive plea.

They would not listen to me in no way. They wanted to go all the way, they don't want any deal.

At this point, I spoke individually to Camera, the younger one most particularly, and said to him, you're not to be influenced bo your brother or, I forget the first name of Rinaldi—

Q. Are you referring now to speaking to Edward Camera, the petitioner?

A. I don't know. I don't recall if he is the older one or younger one. Tom was the younger one. I spoke to Tom, and I spoke to the petitioner.

First I spoke with them collectively and then directed my remarks individually. They would not listen.

I tried in every which way to convince them that it was most opportune and they should listen to me as their lawyer to make a disposition of this case by a plea at this stage of the proceedings, which was most unusual.

I had never had this type of situation in any of the cases I have tried and I have tried many, many, many cases.

I explored the—by questioning them. As I say, I directed specifically my remarks to the younger one because I thought he being youngest, might be influenced by his older brother and the answer was strongly and adamantly negative.

Now, the younger Camera had also been represented by me in another case that was pending at the time when I was retained in this case. That involved some charges of smuggling untaxed cigarettes from, I believe, South Carolina or North Carolina, which I took care of and disposed of.

So my relations with him were naturally that of attorney and client, and I tried to use my best efforts to that effect, because I wanted them to listen to me. They wouldn't.

When they wouldn't, I remember they were—I told the guard and court attendant that I was through. He took them downstairs and I remember going downstairs again to the jail lockup before court reconvened and again spoke to them and told them that such an opportunity would not present itself again during the course of this trial.

We went through the same thing again with no better result.

Now, I believe I had a conference within the judge's chambers also, with the assistant, relative to my meeting with my clients in the courtroom, but I don't recall whether they were present at that conference. My best recollection is that they were not present at that conference. I may be wrong about that.

The case then proceeded to trial, continued with trial to the very end.

Q. At any other time during the representation, subsequent representation through the trial of this case, did there come a time when there was any question of a conflict rising between your representation of the various defendants?

A. Before I took this case—or directing my remarks specifically in answer to your question of this case, I inquired thoroughly as to the possibility of any conflict. It is not unusual to have multiple defendants where there is a conflict and you just can't represent them. That was not the case here.

I also remember when I first appeared before Judge Titone, I told him—and this should be a matter of record—that during one of the calendar appearances and this, I think, was prior to motions that I see no possibility of any conflict arising here, none exists at the present time.

Q. Did you ever become aware of any facts to the effect that either Thomas or Edward or both were participating in a crime against their will?

A. No, sir.

Q. If you had ever become aware of such facts, what would your response have been to represent him?

MR. COHEN: Objection.

A. Well, before I answer—

MR. COHEN: Objection.

THE COURT: Sustained. I don't think I will take that question necessarily. Maybe as it develops, but not now.

THE WITNESS: Your Honor, some of these questions—

MR. COHEN: If I may, Mr. Lefkowitz, although he is a member of the bar, is a witness in this case and I prefer that he not have conversations with the court during these proceedings.

THE WITNESS: Well, I am stating for the record—

MR. COHEN: I object for the record to the witness speaking without being asked a question.

THE COURT: Let the lawyer ask you questions.

Q. Did there ever come a time during your representation of the three defendants that you felt that you were emphasizing the defense of Mr. Rinaldi at the expense of Edward or Thomas Camera?

MR. COHEN: Objection, leading.

THE COURT: Overruled.

A. Of course not. It never occurred.

Q. You mentioned in passing that the fact of one attorney representing several defendants, particularly in a criminal matter is a common incidence.

MR. COHEN: Objection, your Honor, that was not Mr. Lefkowitz's testimony.

THE COURT: I understood him to say that it happens that there are conflicts and they do arise.

MR. COHEN: But that was not Mr. Forte's question. Mr. Forte's question was, I think, it is a common incident to represent more than one defendant in an action.

THE COURT: But also it is common that a conflict will arise.

MR. COHEN: I don't think that was Mr. Forte's question.

THE COURT: Let's go back and see if we can find that.

(Record read.)

THE COURT: Go ahead.

Q. In your experience as an attorney have you confronted that situation other than the present one where you had multiple defendants?

A. Yes, sir.

Q. Under those circumstances, did you ever come across a conflict in representing those multiple defendants?

A. Well, before I answer—

MR. COHEN: Objection.

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A. Yes, sir.

Q. Under those circumstances, did you ever come across a conflict in representing those multiple defendants?

MR. COHEN: Objection.

THE COURT: Overruled.

A. Yes. And when it did, there had to be new counsel.

Q. At any time, Mr. Lefkowitz, did you ever prevent or tell Edward Camera that he could not speak to you or prevent or tell him that he could not speak to you?

A. Never.

Q. Did you ever tell Edward and Thomas Camera to leave the room while you carried on a private conversation with Mr. Rinaldi?

A. During the first conference, yes. I spoke to each of them individually after speaking to them collectively.

Q. So, in other words—

A. And when I spoke to them about the case, I don't remember if Rinaldi senior was—I think he was present at the first conference, but he was asked to leave the room.

MR. FORTE: I have no further questions.

MS. BAMBERGER: May we take one minute, your Honor.

THE COURT: Yes.

(Pause.)

CROSS-EXAMINATION BY MR. COHEN:

Q. Good afternoon, Mr. Lefkowitz.

Mr. Lefkowitz, do you recall speaking to Miss Bamberger on the telephone on May 28 of this year?

A. Yes, I do.

Q. About this case?

A. That's the only time I spoke to her, she called me.

Q. Do you recall telling—withdrawn. Was it your testimony on direct examination that when you were hired to defend Mr. Rinaldi and the Camera brothers you did speak to Mr. Joseph Camera?

A. Joseph Camera?

Q. Joseph Panzer? I'm sorry if I said Camera.

A. Joseph Panzer. Yes. I not only spoke to him, I went up to his office.

Q. Do you recall telling Miss Bamberger on May 28 of this year that you never spoke to Mr. Panzer?

A. No, I have no such recollection.

Q. Now, with respect to your fee for this case, your fee was paid by Mr. Rinaldi's father, is that correct?

A. My best recollection—I say I'm talking from a recollection. I think that Mr. Rinaldi senior is the one who was responsible for the fee and paid the fee. But I couldn't be too sure on that.

Q. Mr. Lefkowitz, approximately how much before the trial did you first begin to represent Mr. Rinaldi and the Camera brothers?

A. Mr. Rinaldi? Which one?

Q. Nicky Rinaldi, the junior one?

A. I didn't represent him separately at any time.

Q. I said Mr. Rinaldi and the Camera brothers?

A. I don't know, six months, four months, I have no recollection better than that.

Q. When you first met with them, Mr. Rinaldi senior was present, is that correct?

A. At the first meeting when they came to my office, the father of Rinaldi was along with them, yes.

Q. And you proceeded to ask—withdrawn. Mr. Rinaldi senior had already told you a little bit about the case, is that correct?

A. He told me what the charges were.

Q. And when you first sat down with Mr. Rinaldi junior and the Camera brothers, you began to ask them what this case was about, is that correct?

A. Certainly.

Q. And who did most of the talking on that first meeting?

A. They all did a lot of talking. I'll say one thing. Rinaldi did more talking than the Camera boys and I'll say that the youngest Camera was the least talkative of them all.

Q. When you refer to Rinaldi there, you refer to your client, Nicky Rinaldi?

A. The defendant.

Q. Yes, the defendant Rinaldi, not the father?

A. Nicholas, that's right.

Q. And it was at this meeting that you discussed the possibility of a conflict of interest, is that correct?

A. Yes, of course.

Q. When you say you discussed the possibility of a conflict of interest at this meeting, was this the same meeting at which there were two detectives that you had hired on the case?

A. No.

Q. Do you recall there being two detectives that you had hired to investigate the case, private detectives?

A. I have no recollections of any detectives hired in this case.

Q. Do you recall hearing about the existence of a statement that was allegedly made by one of the defendants?

A. I recall a detective that was hired post-jury verdict and I know that I had investigation of the case but I don't recall any—your term or the use of the word "detective."

Q. I'm sorry, I don't mean to suggest that the person was a detective. You are correct, Mr. Lefkowitz, and I withdraw it.

Did you have an investigator on the case prior to the verdict?

A. I certainly had investigation of this case, yes, I did.

Q. Among the results of the investigation you learned that one of the defendants had made a "statement" to the police, isn't that correct?

A. Rinaldi had made some statement to the police.

Q. You knew that prior to the trial?

A. I learned of it—I couldn't tell you now when I learned of it. I'm pretty sure I learned of it at some point during the investigation.

Q. You learned that it was Mr. Rinaldi who made the statement or you learned that a statement had been made?

A. I don't recall.

Q. Now, the discussions that you had with Mr. Rinaldi—

A. Excuse me. What you are terming to be a statement, I never recall that Rinaldi ever made a statement to the police in that sense.

Q. Well, you do recall the statement in this case, at least that I referred to, the only statement, I believe that came from any of the defendants, was the statement that was attributed to Mr. Rinaldi during a conversation he had with the police immediately prior to Barbara DeMattoe's return?

A. He had lots of conversations. He was trying to recover $75,000 that he claimed he had lost.

Q. Well, let me ask you this, Mr. Lefkowitz. Do you recall doing a Huntley hearing in the middle of the trial on a statement from Mr. Rinaldi?

A. If you ask me now whether I conducted a Huntley hearing, I have no recollection. If you showed me testimony with respect to that, it will refresh my recollection.

Q. The discussion that you had concerning a possible conflict of interest, that took place with Mr. Rinaldi, with both Rinaldis?

A. It did not take place with both Rinaldis. Rinaldi senior had nothing to do with this case except responsibility.

Q. Was he present in the office when you had the discussion?

A. No, he was not.

Q. Were the Camera brothers in the office at the time you had the discussion?

A. Yes, they were.

Q. Is it fair to say that the discussion went something like this, you asked them whether or not anybody had made a statement to the police?

A. Oh, sure, I inquried about any admissions at any time made at any time.

Q. And with respect to a possible conflict of interest, it is fair to say you were concerned that one defendant may have said something that might affect another defendant?

A. Yes.

Q. And you realized that as an attorney you couldn't represent all the defendants at that time?

A. Yes.

Q. And your inquiries were along those lines?

A. My inquiries were whether there were any statements made by any of the three defendants which were incompatible to the other defendants.

Q. And the answer you received was no?

A. The term conflict was rarely used during the conference. I doubt that my client's at that time knew what the word conflict meant.

Q. And the answer to your question concerning admissions was that no one had made any admissions, isn't that correct?

A. I recall no admissions of any adverse interest having been made or admitted to me during this conference or at any other conference that I had.

Q. And at that point you were satisfied that there did not appear to be a conflict between each of these defendants, isn't that correct?

A. That is correct.

Q. Was it at this first meeting that you discussed the case individually with each of the defendants?

A. Yes, sir.

Q. And—

A. When you say discussed the case, that's exactly what I was seeking to learn from them individually as to whether any of the other defendants was utilizing any factors contra to what this particular defendant was telling me or whether there was some other information that I could learn individually which I could not obtain collectively.

Q. And is it fair to say that during each of these individual discussions you asked each individual defendant what happened, is that correct?

A. Yes, sure.

Q. And you received a story, each individual defendant told you what happened?

A. That's correct.

Q. And nothing that you learned on the basis of that interview caused you to believe that there was a conflict, isn't that correct?

A. That is correct.

Q. Now, do you recall during the triall seeing the Grand Jury minutes of Barbara DeMatteo in preparation for your cross-examination of her?

A. I'm sure that I was furnished all of the material comparable to our rule 3500 in the federal court. And that Grand Jury minutes was part of it, part of the testimony of the DeMatteos before the Grand Jury.

MR. COHEN: Judge do we need this marked or deemed marked?

THE COURT: You can deem it marked if you will identify it.

MR. COHEN: Grand Jury minutes of Barbara DeMattoe's Grand Jury testimony before the Grand Jury.

THE COURT: What date?

MR. COHEN: It appears to be January 11, 1971.

A. Are you asking me if I was shown that after the trial?

Q. No, during the trial?

A. After the witness testified, yes.

Q. I direct your attention to line 13 page 15, but you are free to look at the whole page. I have no desire to conceal anything.

A. I read the answer on line 13.

Q. Now, do you have a recollection at this time of seeing that question and answer or that answer during the trial?

A. Have I a recollection of what?

Q. Of seeing that answer during the trial when you read the Grand Jury minutes?

A. What appears here was part of the direct testimony of the DeMatteos.

Q. In the Grand Jury?

A. Not in the Grand Jury.

Q. Take a look at the document.

A. You asked me a question if I have a recollection whether this appeared at the trial.

Q. I'm sorry, I must have confused you.

A. Then I'm mistaken.

Q. Mr. Lefkowitz, the question is, do you recall during the trial reading the Grand Jury minutes of Barbara DeMatteo?

A. Of course.

Q. When you look at that page and that line, number 13, do you now have a recollection of seeing that at the time?

A. If this is the transcript of the Grand Jury proceedings, I saw it and read it and used it in whatever purpose I could find for advantage in cross-examination.

Q. And when you came across the line where Mrs. DeMatteo indicates that Thomas was held captive by Nicky Rinaldi, what did you do with that information?

A. I didn't read here anything that says that she was held captive by Nicky Rinaldi.

Q. He, Thomas Camera. Could you read line 13, Mr. Lefkowitz?

A. Sure. "We met them around the 15th of December. He took the boy, Tommy, prisoner in his home."

Q. Now, when you read that during the trial, did you do anything with that information?

A. Did I do anything? I don't remember what I did with it, because I know that I don't recall him being held prisoner. I do recall that the youngster had been using some heavy drugs and that he lived with the Rinaldi's and that they took care of him for some time.

Q And you were informed of that?

A. That's all I have a recollection of.

Q. And you were informed of that by Nicky Rinaldi, is that correct?

A. What I was informed of, I tried to put on the record before, and I will decline to answer unless I am directed by the court on the grounds that this is privileged communication between attorney and client. If your Honor directs me to answer these questions, I will be happy to.

THE COURT: Which client are you talking about?

THE WITNESS: I'm talking about Rinaldi who is not here.

THE COURT: Well, I don't think he has waived his privilege.

MR. COHEN: I think that will suffice, your Honor.

Q. Let me ask you this, Mr. Lefkowitz. The information that's contained at line 13, am I correct in saying, that you didn't do anything about that information when you saw it?

A. Mr. Cohen, you prepared this case, I haven't. You have read the record. If there is anything in the cross-examination of Mrs. Dematteo regarding this, please call it to my attention, and I'll be happy to answer your question. If you are probing my recollection, I have no recollection of this at all.

Q. Thank you. Do you have a recollection of speaking to Thomas about that once you learned of that?

A. As part of all facts relating to this case, I got a collective story from the three of them and I got individual stories from each of them. I found no disparity, I found no antagonism, I found no factor that one claimed and the other one did not or one told the other to forget about. That's all I recall.

Q. Let me ask you this.

Then it is fair to say that you didn't know that there was a claim that Thomas was a prisoner in the Rinaldi household until you got to the trial, isn't that correct?

A. I have no recollection of any claim that Tom Camera was a prisoner of Nicholas Rinaldi.

I do know and I recall, and this is one of the poignant and cogent reasons for my inquiry in this case, I know that there had been a private investigator who had conducted lie detector tests of each of these co-defendants and the father and mother of Nicholas Rinaldi and I believe the DeMatteos and every one, including the kitchen sink, that he was suspicious of, of having taken the $75,000 from his safe. And because of that fact, it caused me to look much deeper in my inquiry as to trying to learn any factor which could possibly create any adverse circumstance between the defendants.

I assure you, if I had any response along any such line, I couldn't possibly take the case.

Q. I understand that, Mr. Lefkowitz. That's why I am asking you whether the first time that you became aware that there was a claim that Thomas was a prisoner was during the trial?

THE COURT: What do you mean by the claim?

MR. COHEN: There is a statement by Barbara DeMatteo in the Grand Jury that Thomas was a prisoner. I don't imagine how he could know if that was true or false.

A. First of all, I want you ti know, counsel, I didn't question Miss DeMatteo very much and I think my cross-examination would indicate that.

Q. Let me see if this helps you. I show you page 82 of the transcript and direct your attention to sort of the middle down and see if that clarifies things.

THE COURT: What page?

MR. COHEN: 82, from the middle down.

A. Yes, I have read what you have indicated to me.

Q. Is that the portion of the transcript where Robert DeMatteo indicates that Thomas was being held prisoner or captive by Nicholas Rinaldi?

A. No. That indicates where I asked him a question which reads: "Did you know that Thomas was living in Nick's house for some period of time at that interval?"

And he answers, "I knew he was held in Nick's house for some period of time."

That did not mean to me what you are indicating.

Q. And the comment by Mrs. DeMatteo in the Grand Jury testimony says clearly that he was being held prisoner, is that correct?

A. That's what it says.

Q. Now, the question that I am asking you is, prior to hearing the statement about being held, Thomas being held, and prior to seeing the comment in the Grand Jury minutes when you did in preparation for Mrs. DeMatteo's cross-examination, did you have any idea that there was such a claim in the case?

A. No. I have previously answered you—

Q. I apologize, Mr. Lefkowitz and I didn't understand your answer. I now accept your answer as no.

A. I indicated that he had indicated that he had lived there for some time.

Q. Now, the discussions that you had concerning a plea which occurred at some point into the trial, is that correct?

A. Yes.

Q. Am I correct that you explained the plea offer to the defendants and to whatever family was present and awaited a response, that's what you did first?

A. I didn't hear your last phrase.

Q. And awaited a response, awaited to hear a decision from them?

A. Oh, yes.

Q. And when you explained it, you explained that the offer appeared to hold a maximum of four years but that the judge would consider probation on an individual basis and dependent upon the probation reports?

A. No, I didn't say that.

I say that the maximum would be four years, but the judge said to me that that does not mean that he has to give them four years and that what he would give them could very well mean that they would not do more than one year.

Now, that's what I explained to them.

Q. And at the point that you explained that to them, it was Mr. Edward Camera—do your Mr. Edward Camera? Do you remember who he was back then, you may not remember him now?

A. Frankly, I don't know whether this is Edward or Tom.

Q. But you knew who Edward was of course, back then?

A. Yes, I explained to you. Thomas was the youngest one of the three.

Q. Do you remember Edward Camera saying I think I want that plea?

A. No, I don't.

Q. Do you remember one of the relatives of Rinaldi, that is his mother or father, saying, well, if Eddie takes the plea, won't that hurt Nicky and Thomas?

A. No, that is absolutely not true.

Q. And you said that you had a long discussion with—

A. I told these defendants at this time not to be influenced by any of the others and if any one of them wanted to take a plea and if the others don't, that they should and have to get another lawyer.

Q. You were prompted to say that when Nicky Rinaldi said to you, in response to your giving that plea offer, hey, what's going on here, I hired you to try this case, not to plea, I could plead it with Panzer and that's when you said—let me finish the question. That's when you said to Eddie and Tommy, look, you shouldn't be influenced by this guy, if you want to take the plea, take it?

A. I don't have any such recollection of him saying anything like that to me. He always had the highest respect for me and so did the other two defendants.

Q. Do you have any idea how long that discussion lasted?

A. Which discussion?

Q. In the courtroom?

A. I think we adjourned some minutes before the usual time, which would be before one and it took the whole hour. I may be off a few minutes, but the whole hour.

Q. Before you went to court in the afternoon, you went downstairs to talk with them?

A. I went down again. When I advised the court attendant and the guards that we were through with the conference, they took them downstairs. That's where I am a little hazy in my recollection. I don't remember if I went upstairs to the judge's chambers where there was another conference and then I went again downstairs to see my clients or I went downstairs again and tried once again, because I knew it was the last shot, and then went up to the judge's chambers.

Q. Now, you indicated that the first time you appeared before Judge Titone you had informed him that there was no conflict and you were representing all three defendants, is that correct?

A. Yes, sir. I definitely did that.

Q. Was it—is it your recollection that you gave the judge that information on the record?

A. Well, I know that the Supreme Court is a court of record and there is always a court reporter and even though you are answering a court calendar, I do believe they take—I don't know if they take this down. My own impression is that they do.

Q. In any event, as an experienced criminal defense lawyer or litigator, you don't have ex parte conferences with the judges, is that correct?

A. I didn't have any ex parte conference with any judge. But any good judge who sees one lawyer representing a group of defendants—I don't mean an arraignment. I am talking about even coming into the trial part, the judge would ask about the possibility of a conflict.

Q. You're not used to having off the record discussions without your adversary present?

A. The judge wouldn't permit it.

Q. And since you have indicated, I think here, that your memory, since the event was nine years ago, was not that sharp, would it be fair to say that the record of that proceeding before Judge Titone indicated no record of a conflict, then you would be mistaken?

A. I would rest on the record.

Q. Now, was there ever a time subsequent to the first—your first meeting with the defendants and on that occasion you have testified that you met with each one individually after having a general meeting, is that correct?

A. I don't understand you.

Q. The first time you met the three defendants in the case, you had a general meeting, isn't that correct?

A. The three of them were present. We had a collective meeting and individual one. And then again collective.

Q. After that, was there ever an occasion in which you met with Mr. Rinaldi alone and excluded Mr. Edward Camera and Mr. Thomas Camera?

A. I never excluded anyone of them. If you ask me, did Mr. Rinaldi ever come to see me alone, I have no recollection, but it is possible. And the same things goes for the Cameras. I told you I represented Tom Camera in another matter.

MR. COHEN: Your Honor, could I have a moment?

THE COURT: Yes.

(Pause.)

Q. Mr. Lefkowitz, could you turn to page 249 and 250 of the trial transcript, please.

A. Yes, sir. What line?

Q. Start at the bottom of 249, I think, and read on unti about three-quarters of 250.

(Pause.)

A. Yes, I have read it. And my recollection is quite refreshed after reading it.

Q. That discussion which you have just read, as I understand it, and you correct me if you think I am wrong, it is the conclusion of an in chambers conference that you and Mr. Minardo had with Judge Titone as to the physical evidence the prosecution was going to offer?

A. Yes.

Q. I think it again is on page 238. See if I am correct. I think you will say that's the beginning of the in chambers conference.

A. Yes.

Q. At the in chambers conference the defendants were not present, is that correct?

A. That's correct. They were not present.

Q. Now, one of the subjects of this in chambers conference was the prosecutor's presentation of the physical evidence that you referred to on your direct examination, isn't that correct?

A. That is correct.

Q. And it was after you learned of the expected offer of the physical evidence that you took Judge Titone's excellent offer and communicated it with the defendants, is that correct?

A. That is correct.

Q. And is that what the paragraph on page 250 with respect to, "Judge, I have spoken to you before about these conflicts, and I would like an opportunity to talk with the defendants and family," et cetera. Is that what that refers to, discussions of a plea?

A. I said reading this has refreshed my recollection that there was discussion about any possibility of a conflict in this case on that if any arose, that I would immediately advise the court. And this speaks for itself in my statement to the court.

Q. You make the reference, do you not, Mr. Lefkowitz, that you have mentioned to the court before about the possibility of a conflict. When you said that to the judge, what you were referring to was the conflict between one defendant wanting to plead and one not wanting to plead, isn't that correct?

A. No, I don't think it means just that.

Q. What other specific conflict did you have reference to when you made that statement?

A. Any conflict of interest, in my opinion, where it is just not a Bruton issue, where it is in fact any adverse influence that one defendant may have upon another from withholding some evidence, from—

Q. It could be a variety of different things, couldn't it?

A. Oh, absolutely.

Q. The question I am asking you is, your words about, "I have spoken to you judge about a possibility of a conflict here," you already said they referred to a possibility of conflict on the plea. What else, specifically, did you have reference to when you spoke those words?

A. My recollection is that I spoke to Judge Titone at the very outset when I was asked about any conflict and I told him that I found no conflict at the present time and don't foresee any possibility of any. If any would come about, I would notify him.

Now, insofar as this statement here, it is quite possible, Mr. Cohen, that when I was speaking to these defendants, and during the lunch hour conference, it is quite possible that I discerned a greater disposition towards acceptance of the plea from one of the defendants as against another. And when I heard any tough talk about going all the way and everybody joined in, that was one of the reasons that I went down and spoke to them again, because I said to them, explicitly, not to be influenced by any of the others and specifically, I said that because I wanted them to know that it was not a hopeless situation, that another lawyer could appear for an individual.

Let us presume that two wanted to proceed with the trial and one wanted to plead, it could readily be arranged.

Q. But they would not, of course, be able to proceed with you?

A. No.

Q. Now, Mr. Lefkowitz, when you said on page 250, "Well, your Honor, I told you from the very outset of the possibility, that I felt a possibility of conflict of interest of these people," and then you go on to say that you went down to talk to them this very morning, is it your testimony now that that referred to the possibility that one defendant maybe wanted a deal and maybe the other two didn't? Is that your recollection now?

A. This occurred after we had the conference in the court's chambers.

Q. It occurred at the conclusion of your conference in chambers?

A. That's correct. This could very well indicate my thinking that I might have run into some kind of a buzz saw situation where one of the defendants might want to plead and he might be influenced by another not to plead.

THE COURT: Mr. Lefkowitz, at page 250, the conflict that you identified to the court is that you state, "I am counseling them that there could very well be a conflict if they are not telling me the truth."

THE WITNESS: That's right, judge.

Q. Mr. Lefkowitz—

THE WITNESS: Thank you.

Q. Mr. Lefkowitz, as the judge just focused on it—

THE COURT: I am just reading from it. That was the only identification that I found there as to what this possible conflict was and whether there is some testimony that it had been received or evidence that had been received which directly contradicted the testimony of one or more of the defendants.

MR. COHEN: If I may, your Honor, maybe I can clarify this with a question.

Q. That specific reference that the judge pointed out, "I am counseling them that there could very well be a conflict if they are not telling me the truth," isn't it true that that was a reference to your learning at this point in the trial, when you were well on your way with your defense strategy, that one of the defendants had made this statement that came out later?

A. I really don't recall. I'm sorry.

Q. You do recall this, though, just to see if I understand your testimony. That—well, let me back up for a minute. You say here, with reference to the judge's statement, from the very outset, "of a possibility of a conflict."

That clearly is not a reference to your anticipation of a buzz sawing situation when you talked to the defendants, is it?

A. That's correct.

Q. That's a reference back to something else, isn't that correct?

A. That is correct.

Q. And the reference back to something else is your feeling that one or more of the defendants may have been interested in a disposition of this case and that's what you had reference to when you said that?

A. None of the defendants were interested in a disposition of this case at any time when I accepted the case and when the case proceeded to trial and I urged the disposition at this conference and it is at this conference that I was particularly perturbed about the possibility of anyone of them influencing the other.

Q. Mr. Lefkowitz, when you referred here to, "your Honor, I told you from the very outset about the possibility of a conflict," is it your testimony here today that there was no prior reference to the judge of a possibility of a conflict?

A. That's not what I said, counselor.

MR. COHEN: I misunderstand, your Honor, I apologize.

THE COURT: Mr. Lefkowitz, on what did you refer to when you said, "Judge I told you here before about the possibility of a conflict"?

A. I don't want to speak about any case, but this case is no different than any other multiple defendant case that a counselor is called upon to defend and it is my practice to explore the possibility of a conflict and to advise the court.

It is also my experience, Mr. Cohen, that any seasoned judge not only looks with a jaundice eye upon one counselor representing multiple defendants, but he inquires as to whether counsel has made judicious inquiry as to the possibility of a conflict.

If he does not get a satisfactory answer, he will not permit counsel to represent the group.

Now, this is what I recall in this case as no different than any other case. I told Judge Titone that I saw no conflict and if I at any time felt that anything arose, I would so notify him.

My reference on page 250 is only refreshing my recollection that I brought this to the attention of the court of such a possibility and I wanted this conference with their wives, with their parents, to utilize all influence so that there would not be or at least to minimize any effect adverse to one against another which would be a conflict.

Q. So, Mr. Lefkowitz, it is your testimony that you had kept the judge updated on the non-existence of a conflict, isn't that correct?

A. Yes.

Q. You reminded the judge on one or more occasions that you didn't perceive there to be any conflict?

A. That is correct.

Q. When you say at this particular point in the trial, "Well, your Honor, I told you from the very outset of the possibility that I felt, a possibility of conflict of interest of these people," and then you go on to say, "Because I am counseling them that there could very well be a conflict if they are not telling me the truth," that had no reference to any specific conflict that existed at all, that you were aware of?

THE COURT: If they weren't telling him the truth?

Q. That's right, if they were telling you the truth?

A. I believed what they were telling me the truth.

Q. On the basis of this, at this point in the trial you had no feeling that there was a conflict at all?

A. No, I had no such feeling.

Q. Now, Mr. Lefkowitz, do you recall any occasion in which you, the prosecutor and the three defendants were in Judge Titone's chambers from the beginning of the trial?

A. I have no such recollection, I'm sorry, Mr. Cohen. It could very well have happened but I don't recall any presence of the defendants in chambers.

Q. You recall yourself being in chambers?

A. Oh, yes. Will with, of course, the assistant district attorney.

Q. Yes, of course.

MR. COHEN: Judge, I think I have finished. Your Honor, I have no further questions.

Thank you, Mr. Lefkowitz.

THE COURT: Any further questions?

MR. FORTE: No further questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: We will take a short recess.

(Recess.)

(Open court).

APPENDIX "E"
PARTIAL HEARING TRANSCRIPT OF JUSTICE VITO J. TITONE

MR. FORTE: I would like to call the Honorable Guido Titone.

GUIDO TITONE, called as a witness by Respondent, was duly sworn and testified as follows:
DIRECT EXAMINATION BY MR. FORTE:

Q. Judge Titone, you are presently an Associate Justice at the Appellate Division of the Supreme Court, is that correct?

A. Second Judicial Department, yes.

Q. Prior to becoming an Associate Justice of the Appellate Division, were you a trial judge at the Supreme Court, Richmond County?

A. I was a Supreme Court judge for the Second Judicial District which was Staten Island and Kings County.

Q. Do you recollect in 1971 having been the judge presiding at the trial of Edward Camera, the petitioner in this matter?

A. Yes, I believe there were three defendants, Edward Camera, Thomas Camera and Nicholas Rinaldi.

Q. Do you recollect who the attorney was who represented the defendants?

A. Well, they started with one attorney whose name I can't recollect and then the trial itself was by Mr. Jack Lefkowitz.

Q. During the course of the trial, Mr. Lefkowitz represented all three defendants, is that not correct?

A. That's correct.

Q. During the course of the trial did there ever arise a problem with regard to Mr. Lefkowitz's representing the three defendants, if you recollect?

A. Well, you say a problem, there was no problem, really. He was representing them and I was trying—I expressed a need for them to consider possible conflict in view of the fact that some wanted to take a plea and others didn't and I felt that possibly there may have been different defenses.

Q. Do you remember whether the defendants were there at that time when you discussed it?

A. Not primarily, no, not at first.

Q. Did there come a time when you discussed the question of representation by Mr. Lefkowitz when all the defendants were present?

A. There came a time when I spoke to Mr. Lefkowitz and he was to see them downstairs. I think it was during the lunch hour or luncheon recess. But this case was a very novel case.

From the very beginning I was very insistent upon the boys taking a plea. And I say boys because that's what they were at that time.

I saw that possibly one wanted to take a plea and two didn't and then later on they switched as to who wanted to and who didn't, and I had the parents in.

I advised them that I felt that the boys should have separate counsel and they felt that Jack Lefkowitz was the best they could get for the three and that there was no conflict in their defense. The defense being that there was no kidnapping.

I then spoke to Jack Lefkowitz and I spoke to the parents and there did some a time when I spoke to all the parties together.

Q. Do you recollect what you said when all the parties were together?

A. It is very hard to really recollect other than that I felt they should have counsel, each one should have counsel. This was nine years ago.

Q. Were you satisfied that each of the defendants understood?

A. I was satisfied that each defendant fully understood and all defendants wanted Jack Lefkowitz as their attorney, that was their choice.

Q. Do you remember, your Honor, whether this conference occurred in chambers or in the courtroom?

A. If I may, most of the conferences took place in chambers. The reason for it being, in Richmond County we had no air conditioning at that time, as we don't have at this time, and my chambers were air conditioned and I had just had surgery and was very uncomfortable because I had a drain in my back, and I was bleeding and I foolishly went back to court because I was in the middle of a kidnapping trial. So, therefore, I held most of my conferences and most of my discussions in chambers.

Q. And at any time during the course of the trial after these various discussions—I withdraw the question.

MR. FORTE: May I have a moment, your Honor?

(Pause.)

MR. FORTE: I have no further questions, your Honor.

CROSS—EXAMINATION BY MR. COHEN:

Q. Good afternoon, judge.

Judge, you indicated that you perceived early on in your relationship with the case that there was a conflict among the defendants in the sense that it appeared that one wanted a plea and perhaps others did not, is that correct?

A. Yes, and it changed.

Q. And what?

A. It changed as to which ones wanted to plead.

Q. At certain times perhaps Edward wanted to plead and then Thomas did not and then Thomas wanted to plead and Edward didn't?

A. Yes.

Q. Do you ever recall a time when Nicholas Rinaldi wanted to plead?

A. I can't say at this time.

Q. Did there ever come time as you perceived as the judge in the case—did you perceive of any other conflict?

A. No, none whatsoever.

Q. Now, the way that you perceived that one person—

A. Excuse me, I should expand. I saw really no conflict possibly between the two Cameras and then Rinaldi on another side, but then as it developed, I saw there was no conflict because their defense was the same, there was no kidnapping.

Q. But what you were first referring to was that you saw the Cameras didn't seem to have any inconsistent defenses among themselves?

A. Not among Thomas and—

Q. Edward?

A. Edward.

Q. At least there may have been at one point a thought?

A. Well, at that time I thought, as he was involved in the charade of lie detector tests and looking for money that was missing, et cetera, et cetera, I felt that possibly they were going along with Rinaldi and then I also felt that possibly Rinaldi was the one who put up the money for the attorney and they possibly couldn't afford an attorney. So, therefore, I advised their parents and them that the Court would assign counsel if need be.

So that was the only thing I perceived was the possible dominance of one over the other two.

Q. And you were advised by Mr. Lefkowitz on more than one occasion that there was no conflict that he perceived, is that correct?

A. He perceived absolutely of no conflict.

There did come a time, I think, when he said he did want to speak to them and he did speak to them at length.

I think it was over a prolonged luncheon recess of sorts and then he came back and said no, that was it, they understood and he was going ahead.

Q. Let me ask you this. When you sat at this trial, do you ever recall seeing the Grand Jury minutes in the case?

A. I can't recollect that.

Q. If you had ruled on a motion to inspect and dismiss, would it have been likely that you would have seen the Grand Jury minutes as part of the Rosario material?

A. I most likely would have looked at it.

Q. You most likely would have looked at it. Well, then, I show you what has previously been referred to as

* * *

during our discussions Edward would say yes. Then Thomas would say yes and then Edward and Thomas would say no and Rinaldi would say yes. Then Rinaldi and Thomas would say no and Edward would say yes.

My position was you either all take the plea or there is no plea.

Q. When you were angry with Mr. Lefkowitz—

A. I wasn't angry at him per se but he wasn't getting through to his clients. I had a feeling he came to Richmond County and he was trying a case before Mr. Minardo who was trying his first Supreme Court case and there was no chance of their being a conviction.

Q. When you had the perception for whatever reason of Mr. Lefkowitz not getting through, you indicated that you offered to assign counsel?

A. Yes, I spoke to the parents then.

Q. When you spoke to the parents at that time, were the defendants there?

A. No, I told the parents that I would set up a courtroom visit with them so that they could speak to their sons.

I believe one of the two, I don't know which Camera, Edward or Thomas, one of them had a wife who had a child who had some sort of brain damage or something or * * *

Opposition

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No. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CHARLES SCULLY, Superintendent,
Green Haven Correctional Facility,
Petitioner,

-*v.*-

EDWARD CAMERA,
Respondent.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971
Attorneys for the Respondent.

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No. 81- **81-790**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES SCULLY, Superintendent,
Green Haven Correctional Facility,

Petitioner,

-v.-

EDWARD CAMERA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

The respondent, EDWARD CAMERA, respectfully seeks leave to proceed here *in forma pauperis*, without payment of filing fees and costs.

Counsel certifies that, in the proceedings below in this case, the respondent was represented by counsel associated with the Federal Defender Services Appeals Unit of The Legal Aid Society of New York City, appointed pursuant to the Criminal Justice Act.

New York, New York
November 18, 1981

Phylis Skloot Bamberger

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether settled principles of law as applied to the facts here mandated the findings rendered by the Court of Appeals (1) that trial counsel's joint representation of respondent and his co-defendants, whose interests were in conflict, affected the representation afforded respondent, and (2) that respondent had not waived his right to unconflicted counsel.

CONTENTS

Page

TABLE OF AUTHORITIES .... *i*

QUESTIONS PRESENTED .... Preceding page

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 9

CONCLUSION 13

TABLE OF CASES

Colon v. *Fogg*, 603 F.2d 403 (2d Cir. 1979) 10
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 10
Gray v. *Estelle*, 616 F.2d 801 (5th Cir. 1980) 10
In re Taylor, 567 F.2d 1183 (2d Cir. 1977) 10
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 10
United States v. *Alberti*, 470 F.2d 878 (2d Cir. 1972),
    cert. denied, 411 U.S. 919 (1973) 10
United States v. *Armedo-Sarmiento*, 524 F.2d 591
    (2d Cir. 1975) 10
United States v. *Donahue*, 560 F.2d 1039 (1st Cir. 1977) . 10
United States v. *Gaines*, 529 F.2d 1038 (7th Cir. 1976) .. 10
United States v. *Quinones*, 613 F.2d 47 (3d Cir.),
    cert. denied, 446 U.S. 937 (1980) 10
Wood v. *Georgia*, ___ U.S. ___, 67 L.Ed.2d 220 (1981) 10

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Edward Camera, the respondent, respectfully prays that this Court deny a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 26, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered on August 26, 1981, and is reported at 658 F.2d 80. A copy of the opinion is included at 1a-22a of the appendix to the petition for writ of certiorari. The decision of the District Court is not officially reported, and is included at 23a-61a of the appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 26, 1981.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent Edward Camera, his brother Thomas, and their cousin Nicola Rinaldi were charged in Richmond County, New York, with three counts of kidnapping in the first degree and other crimes arising from events involving Barbara and Robert DeMatteo. Respondent, his brother, and Rinaldi were all represented at trial by a single attorney, Jacob B. Lefkowitz, Esq., retained for a $15,000 fee by Rinaldi's father. In this joint representation, Mr. Lefkowitz presented a unitary defense that no crime had occurred. His decision to pursue this defense was premised entirely on the theory that the credibility of the complainants, Robert and Barbara DeMatteo, was highly impeachable. And he adhered to this defense during the entire trial, even though it became progressively clear from the proceedings (a) that a crime had occurred; (b) that the evidence of the crime showed Rinaldi to be the ringleader and most culpable; (c) that respondent had available to him a separate defense of duress to the charges (that Rinaldi's violent nature had caused respondent to join Rinaldi in his efforts to regain $65,000 from the DeMatteos) and to the degree of the offense charged (that he did not have the specific intent required by the statute); and (d) that a factual presentation necessary to defend respondent required counsel to plase blame for the events upon Rinaldi and to emphasize Rinaldi's guilt.

Prior to trial, Mr. Lefkowitz, when asked to accept the defense of all three defendants on Mr. Rinaldi Sr.'s retainer, interviewed the defendants separately and together to obtain the facts, with specific inquiry to whether there had been any admissions. Mr. Lefkowitz was aware that Rinaldi had accused Thomas Camera of the theft of the $65,000 from the Rinaldi house, but nonetheless said he investigated and found no possibility of a conflict. Counsel also believed that Thomas Camera was using drugs and living at Rinaldi's house, and that he was involved in criminal proceedings for cigarette smuggling (Rinaldi was in the cigarette business). Mr. Lefkowitz had no basis for believing that respondent was associated with the activities of Rinaldi or Thomas. The term "conflict" was rarely used during the conference with the three defendants, and Mr. Lefkowitz doubted that his clients knew what the word meant. Mr. Lefkowitz recalled advising the trial judge that there was no conflict, that he foresaw none, and that if one arose he would advise the court.

Trial proceeded, with Mr. Lefkowitz representing all three defendants. The evidence showed that on Thanksgiving Day 1970 Rinaldi gave Mrs. DeMatteo a set of keys to his house, which were returned to Rinaldi the following Saturday. Some time over the Thanksgiving weekend, $65,000 was allegedly stolen from

Rinaldi's house. On Monday morning, November 30, while Robert DeMatteo was known to be away on a business trip, Rinaldi went to the DeMatteos' house, forcibly pushed Mrs. DeMatteo into his car and, with a gun drawn, drove away at high speed. Rinaldi screamed at Mrs. DeMatteo and accused her of taking $65,000 from his house. He held the gun first at her side, then at her head. Finally, he stopped the car in front of his own house, where he pulled Mrs. DeMatteo from the vehicle.

Out of the jurors' presence, the prosecutor described the rest of Rinaldi's conduct thus:

> ... [W]hen he [Rinaldi] got her in the home he accused her of taking the money, pushed her down the cellar stairs and at the cellar stairs he held the gun to her head and the gun went off, and then after this occurred, [he] took her upstairs and accused her again of taking the $65,000, and then indicated that she had to take a lie detector test with respect to this missing $65,000.

Defense counsel Lefkowitz objected to this evidence as inflammatory as against Rinaldi, and was concerned about its prejudice to Rinaldi alone. At no time did counsel request an instruction limiting the use of this evidence to Rinaldi; nor did he argue that the evidence demonstrated Rinaldi's violent temper and eccentric behavior.

On December 1, a polygrapher hired by Rinaldi administered lie detector tests to Barbara DeMatteo, Frank and as Camera, Robert DeMatteo's father, and Rinaldi's own father. Thomas Camera testified that Rinaldi also suspected him of the theft and that he was, at that time, both threatened with physical harm if he failed to return the money and held as a captive in Rinaldi's basement, first under complete confinement but later with some privilege to leave Rinaldi's house. Robert DeMatteo testified that he knew Thomas was held at Rinaldi's house for some time; and Mrs. DeMatteo testified that Thomas was a prisoner at Rinaldi's. Defense counsel Lefkowitz acknowledged that he knew that Thomas had been detained at Rinaldi's house, but said that he believed this had occurred because

Thomas was a heavy drug user and Rinaldi was taking care of him. When asked how Mr. Lefkowitz knew this, he invoked the attorney-client privilege on Rinaldi's behalf. The District Court found that Thomas Camera was a suspect in the theft of Rinaldi's $65,000 and that he was probably threatened and confined by Rinaldi at the beginning of December 1970 (30a, 32a, 33a). Respondent was aware of his brother's custody at Rinaldi's house and of the threats to Thomas.

On January 1, as the DeMatteos were driving up to the Rinaldis' house, Rinaldi and Thomas Camera, with drawn guns, forced them to remain in their car. Rinaldi drove their car to respondent's house, where he beeped the horn. When respondent failed to answer, Rinaldi went up to his door and, after a brief delay, respondent came to the car. The DeMatteos, blindfolded, were driven to a building. En route, Rinaldi demanded $65,000, and then a different amount. When they arrived at the building, Mr. DeMatteo removed his blindfold, and a scuffle ensued as he tried to assist his wife. He was wounded when the gun supplied by Rinaldi to respondent discharged. Robert DeMatteo testified that respondent did whatever Rinaldi told him to do; defense counsel objected to the testimony, and it was stricken.

The DeMatteos were then separated from each other. Rinaldi came to talk with Barbara DeMatteo in the room in which she was being held. Respondent was not a party to their conversation, but was merely in and out of the room. It was in this conversation that Rinaldi initiated his demands for ransom. Rinaldi told Mrs. DeMatteo that if she wanted to see Robert alive, she would have to give Rinaldi $100,000, and that she could get this money from the DeMatteos' business. Then Rinaldi told her that he did not want money, that he was going to kill her in any event. Then, with her hands tied, Mrs. DeMatteo was forced to write her father-in-law a note asking him to meet Rinaldi's new demand of $58,000.

Later, Rinaldi had Mrs. DeMatteo telephone her father-in-law for the money.

Respondent and Thomas then took Robert DeMatteo to the hospital. When they returned, Barbara was placed back into her car and a paper bag was pulled over her head. Rinaldi and Thomas sat with her in the front seat; respondent sat alone in the rear seat. During the trip, Rinaldi did not discuss his plans. Finally, Rinaldi and Thomas took Mrs. DeMatteo to a room in a hotel, where Rinaldi tied Mrs. DeMatteo's hands together with tape. Then Rinaldi left. Respondent stayed in the car; he never entered the hotel, and thus did not participate in or overhear any of the discussions which occurred there.

Thomas Camera stayed with Mrs. DeMatteo at the hotel until the following day, but he cut the tape with which Rinaldi had bound her wrists. Adhered to the tape were threads of fabric from Mrs. DeMatteo's sweater.

The following day the police, based on what Robert DeMatteo told them, called Rinaldi and told him to have Mrs. DeMatteo appear at the police station. Rinaldi called the hotel, and Thomas released Mrs. DeMatteo.

When Mr. Lefkowitz learned that the tape to which threads from Mrs. DeMatteo's sweater adhered was to be introduced in evidence, he asked the court for permission to meet with the defendants, Rinaldi's parents (who were paying his fee), respondent's mother, and the wives of Rinaldi and respondent. Mr. Lefkowitz explained the purpose of this conference to the court:

> Well, your Honor, *I told you from the very outset of the possibility that I felt a possibility of conflict of interest of these people*, and I have come here early this morning, and went down to the lockup for this very purpose. And although they say to me one thing, I want them to say it in front of the parents and the wives, so that there won't be any question about it, because I am counseling them that there could very well be a conflict if they are not telling me the truth. This is all in

> connection, Judge, with what I have related to you and to [the Assistant District Attorney] from the very beginning about the possibility of a plea.

At the ensuing meeting, Mr. Lefkowitz did not discuss any revision of trial strategy to show that Rinaldi was the instigator of the events, or that Rinaldi's violent conduct had resulted in respondent's participation in them, or that respondent did not have the specific intent required to be found guilty of two of the counts charged in the indictment. Rather, defense counsel spent the entire meeting trying to persuade all three co-defendants to plead guilty, stressing the judge's promise of lenient sentences. Counsel told his clients that if one of them wanted to plead and the others did not, another lawyer could be obtained. Mr. Lefkowitz noted that one of the defendants was more inclined than the other two to plead. Respondent wanted to plead, but when Mr. Lefkowitz told him his plea would hurt the co-defendants, he continued with the trial. Screaming at respondent, Rinaldi said that he wanted to go to trial.

According to the state trial judge, at some other point in the trial he held an in-chambers conference with Rinaldi's parents and with the Camera brothers' mother. The judge then called all three defendants into chambers to discuss the taking of a plea. The three kept changing their minds about the plea offer. The judge wanted counsel to persuade all three to plead guilty, and said that he would accept a plea only if all three agreed to admit their guilt. The judge felt that the defendants should each have separate counsel because some wanted to accept the plea offer and others did not, but he believed that the defendants were satisfied with their attorney and he therefore did not discuss conflict with them.

Rather than stressing those aspects of each case which demonstrated the strength of the defenses individually, throughout his summation to the jurors Mr. Lefkowitz referred to respondent and his co-defendants as a single unit, making no effort to distinguish among them and allowing the evidence inculpating Rinaldi to be used against to other defendants. Counsel referred to the defendants as "these young men who I am defending." He told the jurors, "on your determination of the facts of this case, these three young men will either go home ... or they will go to jail.... Each of you is the judge who is going to determine the guilt or innocence of these boys." Mr. Lefkowitz said that Robert DeMatteo was a liar, in part because he was "accusing these boys." Finally he said:

> Ladies and gentlemen, I submit to you that if you believe Barbara DeMatteo, don't waste your time. When you go into that jury room, you can return a verdict of guilty without any problem against these boys.

Of the evidence that thread from Barbara DeMatteo's sweater was found on tape removed from the hotel room in which she had allegedly been held, Mr. Lefkowitz told the jurors:

> Now that is bad evidence against these boys. Make no mistake about it.

He never argued that respondent was not present in the hotel room where Barbara DeMatteo had been detained, nor did he mention the fact that respondent was not aware of Rinaldi's plan to keep her in the hotel room. He described Rinaldi's conduct in reporting to the police precinct pursuant to police orders as:

> ... the action of a person consistent with the action of a decent human being, cognizant of law and order, cognizant and respectful of the law th[at] governs our society, a man who doesn't take the law into his own hands, but who calls the police when he is robbed....

And in his concluding remarks, Mr. Lefkowitz said:

> You are the judges who are going to determine whether *they* are guilty or whether *they* are innocent. [Emphasis supplied.]

The Court of Appeals found an actual conflict of interests in Mr. Lefkowitz' representation of respondent at trial. The Court of Appeals concluded that this conflict existed from the very start of the proceedings and became "apparent for all to see" when the physical evidence was introduced and when respondent and the other co-defendants differed in their inclination to accept the plea offer. The Court of Appeals summarized its conclusions thus:

> We believe that the totality of the circumstances amply demonstrates the actual conflicts of interest which existed throughout. Lefkowitz was retained and paid for by one defendant. That party was clearly more culpable and was the leader of the group. There was a strong likelihood that the other co-defendants remained in fear of him. The defense presented was a flimsy one, which was completely undermined by the prosecution's offer of physical evidence demonstrating that a kidnapping had occurred. In discussing plea possibilities, it was clear that the defendants had different views of their interests, and that the leader of the group resisted any attempt by his co-defendants to undermine his position. There was a duress defense which could have been raised had there been separate counsel and which could not have been raised with one counsel representing all three. Given all these factors, there was clearly an actual conflict of interest which adversely affected the representation of the Cameras and Rinaldi by the same counsel.

The Court of Appeals rejected the theory urged by the petitioner before (and accepted by) the District Court that there was no actual conflict because counsel was not aware of the facts which would lead him to believe that there was a conflict. The Court of Appeals found that the circumstances should have made Mr. Lefkowitz realize that there was a conflict, and noted that counsel told the trial judge there was probably a conflict and that he was aware there was a difference between the defendants on whether to accept the plea offer.

The Court of Appeals also found that the state judge violated the requirement of *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980), when he failed to make an inquiry on the propriety of multiple representation despite the fact that he knew, or reasonably should have known, that a conflict existed:

> ... As in Lefkowitz's case, there may have been sufficient evidence *before* the prose-

> cution's offer of proof to put the judge on notice of the diverging interests. Nevertheless, there can be no doubt that such facts existed at the time and immediately after this offer. The judge testified in the district court that he was aware that the defendants were unsure about the advisability of taking pleas and that there was no unanimity among the defendants on this issue. It was clear from trial testimony that Rinaldi was the ringleader. The now discredited story offered by the defense, the defense counsel's mention of the resulting possibility of a conflict of interest, and the difference of opinion as to pleading should have lead [*sic*] him to inquire carefully into the conflicts. The judge's suggestions that separate counsel could be obtained were not sufficient to protect the rights of Edward Camera.

Finally, the Court of Appeals found that there was no waiver of the right to adequate representation and rejected petitioner's argument that the defendants' adherence to Mr. Lefkowitz constitued a constitutional waiver. The Second Circuit concluded that Mr. Lefkowitz never explained to his clients the dangers of multiple representation, and never discussed conflict with them:

> He may well have said that they could arrange for separate counsel, yet such advice would be meaningless where defendants would not be able to see the need for such counsel and where they may have been in some fear of Rinaldi's reaction.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW APPLIED SETTLED PRINCIPLES OF LAW AND REACHED THE RESULT MANDATED UNDER GOVERNING AUTHORITIES.

The decision of the Court of Appeals reflects a careful appraisal of the record below and the correct conclusion that, in Mr. Lefkowitz' joint representation of the respondent and his co-defendants, counsel's actions on behalf of respondent were adversely affected by a conflict of interest and thus did not accord respondent his constitutional due under the Sixth Amendment.

The petitioner does not dispute the presence of a conflict; rather, the petitioner argues that the Court of Appeals' decision precludes the selection by a defendant of a lawyer also representing co-defendants even where a defendant has been told the risks of potential conflict and has the opportunity to obtain separate counsel (Pet. at 12). In other words, the petitioner argues that the Court of Appeals' ruling precludes a knowing and intelligent waiver of the right to separate counsel. However, the petitioner misstates the Court of Appeals' holding. What the Court of Appeals determined was that the information given to respondent concerning his right to counsel — merely that he had the right to a separate lawyer — was inadequate to allow a valid waiver of the right. This is in accord with the decisions which establish the standard for waiver of independent counsel requiring that a defendant be advised of the dangers of joint representation, the meaning of conflict, and the need to subjugate the interests of one defendant to those of another. *Wood* v. *Georgia*, ___ U.S. ___, 67 L.Ed.2d 220, 231 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 344, 347 (1980);[*] *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938); *Gray* v. *Estelle*, 616 F.2d 801, 804 (5th Cir. 1980); *United States* v. *Quinones*, 613 F.2d 47, 49 (3d Cir.), *cert. denied*, 446 U.S. 937 (1980); *Colon* v. *Fogg*, 603 F.2d 403, 407 (2d Cir. 1979); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 593 (2d Cir. 1975); *In re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977); *United States* v. *Donahue*, 560 F.2d 1039, 1043-1044 (1st Cir. 1977); *United States* v. *Gaines*, 529 F.2d 1038, 1044 (7th Cir. 1976); *United States* v. *Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

Applying these settled principles to the instant case, the decision to issue the writ of habeas corpus was unavoidable. The record shows that, prior to trial, respondent was not advised of the potential conflicts in joint representation, in either hypothetical or actual terms, and that he was not apprised of the disadvantages of joint representation or the need to subordinate interests of one defendant for the benefit of the others. At this meeting, respondent was not told of his right to separate counsel. Mr. Lefkowitz testified that the term "conflict" was rarely used during the conference, and "I doubt my clients at that time knew what the word conflict meant." In a subsequent meeting, the subject of which was a guilty plea, Mr. Lefkowitz told the defendants that if any one of them wanted to plead, another lawyer could be obtained; but when one defendant showed a predisposition to pleading, Mr. Lefkowitz said that a plea would hurt the others.

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[*] *Cuyler* does not affect the standard for waiver of counsel, directing its attention to who should provide advice necessary for a valid waiver.

Though the state trial judge told the defendants of their right to separate counsel, his testimony shows that he did not supply the missing information for respondent. At the beginning of the trial, the judge expressed to Mr. Lefkowitz the need to consider a conflict because of possible different defenses, but he never discussed the problem with the defendants because counsel had fashioned a joint defense. Later, when, according to the trial judge, he wanted the boys to take a plea, he saw that there was a difference of opinion among them on whether to plead. Still, he did not tell the defendants why separate counsel would be able better to serve their individual interests *vis-à-vis* a guilty plea.

The petitioner also argues that there was no adverse effect caused by the conflict because counsel was not aware of a conflict. The Court of Appeals rejected this contention not only as to counsel's awareness, but as to the trial judge's as well.

Counsel knew the facts which go to creating a conflict from the beginning: Rinaldi retained counsel and supplied all payment ($15,000); Rinaldi was the most culpable and the leader of what had occurred; Thomas Camera was already under Rinaldi's influence, either confined by him or under his control because of heavy drug use; and respondent was not involved in the activities of his brother or Rinaldi. After Mr. Lefkowitz learned of the availability of the physical evidence, he advised the trial judge that there was a possibility of a conflict. This statement was reenforced in the subsequent dispute about entry of a guilty plea after Mr. Lefkowitz told the defendants that their defense of no crime had been undermined. Thus, the evidence of a conflict mounted as the trial proceedings progressed and the State's evidence revealed the extent of Rinaldi's criminal conduct and the independent defenses available to respondent. In light of the facts and Mr. Lefkowitz' own statement that there was a conflict of interests, the Court of Appeals properly rejected his claim that he was not aware of a conflict.

As for the trial judge, the Court of Appeals found:

> ... As in Lefkowitz's case, there may have been sufficient evidence *before* the prosecution's offer of proof to put the judge on notice of the diverging interests. Never the less, there can be no doubt that such facts existed at the time and immediately after this offer. The judge testified in the district court that he was aware that the defendants were unsure about the advisability of taking pleas and that there was no unanimity among the defendants on this issue. It was clear from trial testimony that Rinaldi was the ringleader. The now discredited story offered by the defense, the defense counsel's mention of the resulting possibility of a conflict of interest, and the difference of opinion as to pleading noted by the judge should have lead [*sic*] him to inquire carefully into the conflicts. The judge's suggestion that separate counsel could be obtained were not sufficient to protect the rights of Edward Camera.

Based on this record, the Court of Appeals properly rejected the notion that a knowing and intelligent waiver of the right to unconflicted and independent counsel occurred here. Further, the Court of Appeals properly rejected the claim that trial counsel and the trial court were unaware of the conflict. In so doing, the Second Circuit applied established principles of law to the facts, and correctly ordered issuance of the writ.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for the Respondent.

New York, New York
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